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OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

DURING THE

DECEMBER TERM, 1882.

BY

JNO. W. SHEPHERD,

STATE REPORTER.

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Humphreys v. Burleson.

Bill in Equity by Distributee, to correct Errors and Mistakes in Probate Decree on Settlement of Administrator's Accounts.

1. *Demurrer; what grounds available on error.*—On appeal from a decree sustaining a demurrer to a bill for want of equity, this court will consider only the causes of demurrer specifically assigned, and will not regard other defects which are amendable; at least, when the bill is not fatally wanting in equity.

2. *Equitable relief against settlements in Probate Court.*—A court of equity has original jurisdiction, independent of statutory provisions, to open settlements of administrations had in the Probate Court; but this jurisdiction, though well established, is sparingly exercised, and the party complaining is required to show, by appropriate pleading, not only that injustice has been done, but also that, by reason of accident, surprise, or the act or fraud of his adversary, unmixed with negligence on his own part, he could not have prevented that injustice at the time of the settlement.

3. *Same.*—When the statutory jurisdiction of the Chancery Court is invoked, for the correction of errors of law or fact intervening in settlements had in the Probate Court (Code, §§ 3837-39), the errors complained of must be clearly and certainly pointed out, and it must be made to appear, by the averment of distinct facts, that such errors were not attributable to the fault or neglect of the party complaining.

4. *Equitable relief against fraud.*—Fraud vitiates any and every transaction into which it enters, even the most solemn contracts, and the judgments or decrees of courts of the highest jurisdiction; and when a fiduciary relation exists between two persons, which renders it the duty of one to communicate to the other full information of all facts within his knowledge, the failure to do so is a fraud, against which a court of equity will grant relief.

5. *Same, as between distributee and administrator.*—Where an administrator, on filing his accounts for settlement, wrote to his sister, who was a distributee of the estate, and resided in Texas, informing her that her

[Humphreys v. Burleson.]

interest in the estate was a specified sum, about one-fifth of its actual value in fact, and inclosing a receipt for that sum, to be signed by her, which would operate as a release, and which was signed and returned to him, and the money paid; *held*, that this was a fraud, against which a court of equity would grant relief by setting aside the settlement, and that the administrator could not be heard to say that the distributee, in relying on his representations, and failing to appear and contest the settlement, was guilty of negligence or other fault.

APPEAL from the Chancery Court of Morgan.

Heard before the Hon. THOMAS COBBS.

The bill in this case was filed on the 19th August, 1881, by Mrs. Isabella Humphreys, a married woman residing in Texas, against Dabney A. Burleson, individually, and as the administrator of the estate of Jonathan Burleson, deceased, who was the father of said complainant and defendant; and sought to set aside a settlement of said administrator's accounts, which was made in the Probate Court on the 13th October, 1879, and to correct errors and mistakes which had intervened in said settlement to the prejudice of the complainant. The chancellor sustained a demurrer to the bill, for want of equity, on several grounds specifically assigned, and dismissed it; and his decree is now assigned as error. The material facts are stated in the opinion of the court.

H. A. SHARPE, for appellant.—(1.) If the complainant was not a party to the probate decree, and is not chargeable with notice of it, she is not concluded by the decree, and is not chargeable with any neglect in failing to appear and contest it. Notice of that settlement was not given to her as required by law, and is not effective for any purpose. The day set for the settlement was the 11th August, 1879; and the notice given was of the administrator's "intention" to present his accounts for allowance on the 13th October, 1879. The provisions of the statute must be strictly complied with, to charge a non-resident with constructive notice by publication.—*Cullum v. Branch Bank*, 23 Ala. 797; *Borgia v. Durden*, 41 Ala. 322; *Wright v. Clough*, 17 Ala. 490; *Hartley v. Bloodgood*, 16 Ala. 233; *Butler v. Butler*, 11 Ala. 668; 27 Wisc. 558; 39 Wisc. 313; 10 Nevada, 370; Wade on Notice, § 1030. If the record had shown proper notice, though the recital might be conclusive on a collateral attack, the want of notice might be investigated in equity.—*Dunklin v. Wilson*, 64 Ala. 162; *Givens v. Tidmore*, 8 Ala. 745; *Crofts v. Dexter*, 8 Ala. 767. (2.) Even if the complainant had due and proper notice of the settlement, the allegations of the bill present a case for equitable relief, both on general principles of law, and under the express provisions of the statute.—*Chambers v. Crook*, 42 Ala. 171, and cases cited; *Dunklin v. Wilson*, 64 Ala. 162; *Kennedy v. Ken-*

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nedy, 2 Ala. 571; *Townsend & Milliken v. Cowles*, 31 Ala. 428; 5 Ala. 596; Bishop on Contracts, § 227. The defendant's misrepresentations, though innocently made, were fraudulent in legal contemplation.—16 Ala. 785; 22 Ala. 501; 9 Ala. 662.

WATTS & SONS, and C. C. HARRIS, *contra*.—The alleged errors and mistakes in the settlement, against which relief is sought, were matters within the cognizance of the Probate Court; and a party to the settlement can not have equitable relief as to these matters, unless the allegations of the bill acquit him of all fault or negligence.—*King v. Smith*, 15 Ala. 264; *Waring v. Lewis*, 53 Ala. 615; *Otis v. Dargan*, 53 Ala. 178. The record shows that the complainant had notice of that settlement, by publication against her as a non-resident; and this was equivalent to actual notice.—*Stabler v. Cook*, 57 Ala. 22. The allegations of the bill are not sufficient to bring the complainant within the strict rule, which requires that he shall negative all fault or negligence on his own part.—*Otis v. Dargan*, and *Waring v. Lewis*, above cited; also, *Bowden v. Perdue*, 59 Ala. 409; *Boswell v. Townsend*, 57 Ala. 308. The bill was fatally defective, because its allegations show that the complainant's husband was a necessary party, and that the other distributees of the estate were also necessary parties.—*High v. Worley*, 32 Ala. 709; *Colbert v. Daniel*, 32 Ala. 314; *Hartley v. Bloodgood*, 16 Ala. 233.

BRICKELL, C. J.—The original bill was filed by the appellant, one of the heirs at law and next of kin of Jonathan Burleson, deceased, to open a settlement of the administration of his estate, had in the Court of Probate, by the appellee as administrator. The bill is directed to the original and general jurisdiction of a court of equity to open settlements had in the Court of Probate, and relieve a party injured by them, when, by accident, or surprise, or by the act or fraud of his adversary, he has been prevented from obtaining a fair and full adjudication of his rights when the settlement was made. And it is also directed to the special jurisdiction conferred by statute on courts of equity, to intervene at the instance of a party injured, for the correction of errors of law or of fact occurring in the settlement of the estates of decedents had in the Court of Probate, when the party complaining is free from fault or neglect. The appellee interposed a demurrer, assigning specially five causes, which really involve but two propositions: The first is, that it is not shown affirmatively that the appellant was, by accident, or surprise, or by the act or fraud of the appellee, prevented from a fair and full adjudication in the Court of Probate; the second is, that it is not affirmatively shown that the

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errors in the settlement, of which complaint is made, occurred without the fault or neglect of the appellant. The demurrer was sustained, and from the decree this appeal is taken.

Whether the demurrer ought to have been sustained, on the causes specifically assigned, is the only question which can now be considered, though it may be apparent the bill is in other respects subject to demurrer.—*P. & M. Mut. Ins. Co. v. Selma Savings Bank*, 63 Ala. 585. The husband of the appellant, it may be, as is now argued, ought to have joined with her in the suit; or, it may be, the other heirs at law and next of kin are necessary parties; or the errors averred to have occurred in the settlement, may not be stated with the requisite certainty; these are not now questions for consideration. If in these respects, or either of them, the bill is defective, by amendment, which is matter of right, the defects could have been cured in the Court of Chancery, if attention had been drawn to them. Attention not having been directed to them, it would be unjust to the appellant now to consider them, and affirm a decree rendered upon other causes of demurrer, which, in our judgment, are not well taken. Such is the rule, at least, when the bill is not fatally wanting in equity.

A court of equity has original jurisdiction, independent of statutory provision, to open settlements of administrations had in the Court of Probate. Though well established, the jurisdiction is cautiously and sparingly exercised; and as a condition precedent to its exercise, it must by appropriate pleading be shown, not only that injustice has been done, but that, at the time of the settlement, the party aggrieved could not, in the Court of Probate, have avoided the injustice, because of accident, or surprise, or by reason of the act or fraud of the adverse party, unmixed with fault or negligence on his part. *Otis v. Dargan*, 53 Ala. 178; *Waring v. Lewis*, *Ib.* 615. To the exercise of the statutory jurisdiction for the correction of errors of law or fact intervening in such settlements, it is also essential that the errors should be clearly and certainly pointed out, and, by the averment of distinct facts, it should be made to appear that such errors are not attributable to the fault or neglect of the party complaining.—*Otis v. Dargan*, *supra*; *Boswell v. Toronsend*, 57 Ala. 308; *Bowden v. Perdue*, 59 Ala. 409. The maxims of the law, intended to quiet litigation, to silence controversies, to give repose to society, security to titles, and to save individuals from repeated vexation for the same cause, are esteemed of the highest importance in the administration of justice, and courts of equity are as unwilling as courts of law to relax their operation.

But fraud vitiates any and every transaction it may infect; the most solemn contracts, and judgments or decrees of courts

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of the highest or most inferior jurisdiction. When a party, by the misrepresentation, by the fraud or deception of his adversary, is lured into security, or is induced to abstain from entering into active litigation, there is no real contestation, no real hearing and adjudication, and the judgment and decree is not in fact what it may on its face purport to be,—the determination and sentence of the court upon the merits of the controversy. By the promises or representations of an adversary, a party may be induced not to attend the sitting of the court; or the true state of the matters involved may be misrepresented or concealed from him, the relations existing between him and his adversary rendering it the duty of the latter to communicate full and truthful information; in these and similar cases, there is, as it is expressed by Judge Story, fraud in the concoction of the judgment or decree, and a court of equity will vacate it, and open the case for a new and fair hearing.—2 Story's Eq. § 1575; Freeman on Judgments, §§ 489-493; Wells' *Res Adjudicata*, § 499; Bigelow on Fraud, 70. The relation existing between these parties, the legal relation—that of trustee and *cestui que trust*—independent of the natural relation of brother and sister, rendered it the duty of the appellee to communicate to the appellant a fair, full, truthful statement of her interest in the estate he was administering. Without such statement, without a full disclosure of every fact necessary to inform the appellant of the value of her interest, he could not enter into any transaction with her, from which he was to derive profit, looking to the extinguishment of her interest, or to his acquisition of it, or to his acquittance of liability for it.—*Ferguson v. Lowry*, 54 Ala. 510; *Malone v. Kelly*, *Id.* 532.

The application of these principles to the facts in this case, as averred in the bill,—and the truth of the averment the demurrer admits,—is obvious. Having commenced proceedings in the Court of Probate, for a final settlement of his administration, the appellee opens a correspondence with the appellant, his sister, residing in a distant State; inclosing to her a mere general statement, that her interest in the estate is a specific sum of money, which he proposes to pay in a particular way. The proposition is accepted, and he sends a receipt, in terms and in legal effect, a complete extinguishment of her interest, and a full release to him from all liability for it, which he requests shall be signed by the appellant and her husband, and returned to him. It is signed and returned, and he remits them so much money, as he had agreed. The sum stated as the amount of the appellant's interest is not probably a fifth of the real amount. That the appellant knew the falsity of his statement, is not questioned, and can not be questioned in view of the facts stated in the bill. The means of ascertaining the pre-

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cise value of the interest of the appellant were in the hands of the appellee, not in her hands, and she had not access to them. There could be but one motive for the misrepresentation, and that must have been the diversion of her attention from the settlement he was proposing to make, the prevention of her interference in the settlement, and the acquisition of her share or interest for a sum wholly disproportionate to its value, or the equivalent of an acquisition, the acquittance of all liability for it. The representation was relied upon by the appellant, and it was very natural for her to rely upon it. It proceeded from her trustee, whose duty it was to give her information upon which she could rely; and it would add to the wickedness of the deception, if he were now permitted to reproach her with fault, negligence, or folly, in trusting and believing him. He invited the trust, and he must keep it inviolate. The trust he invited, the misrepresentation to which confidence was given, absolved the appellant from the duty of examining the accounts filed for settlement, from litigating their correctness, and from presenting her rights and interests to the court for adjudication and determination.

The facts disclose a fraud upon the appellant, which vitiates the settlement, to the same extent that it would have been vitiated if it had been wholly *ex parte*, and without notice. The notice was of no avail, when it was attended with representations, upon which she had the right to rely, that there was no room or reason for controversy—that without it the full measure of her rights would be accorded. It is because of such representations, frauds by which a party obtains unconscionable advantages, that a court of equity is accustomed to annul judgments at law, or the decrees of courts of concurrent jurisdiction, affording a fair opportunity for an adjudication of the rights of parties. Because of fraud in the matter on which the decree or judgment was rendered, the court may not interfere; but, when the fraud lies in an extrinsic and collateral act, by which the judgment or decree is directly obtained, the court will interfere. *U. S. v. Throckmorton*, 98 U. S. 61. There was no *laches* upon the part of the appellant in not litigating in the Court of Probate the matters of which complaint is now made; and whether the bill is regarded as directed to the general, or to the special statutory jurisdiction of the court, the demurrer was not well taken.

The decree must be reversed, a decree here rendered overruling the demurrer, and the cause will be remanded.

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Bill in Equity by Purchaser of Lands at Sale under Probate Decree, for Injunction of Action at Law by Administrator, and Conveyance of Title by Heirs..

72	7
113	161
72	7
184	652
72	7
135	145

1. *Purchase at tax-sale.*—Held, on the authority of *Oliver v. Robinson*, 58 Ala. 46, that “neither the averments nor proofs in this case,” as to a purchase of lands at a sale for unpaid taxes assessed against owners unknown, “are sufficient to effect a divestiture of title for non-payment of taxes.”

2. *Sale of lands by administrator.*—An administrator’s power to sell the lands of his intestate is purely statutory; and unless he files a petition, containing the necessary averments to give the Probate Court jurisdiction to order a sale, that court can make no valid order of sale, save when the parties in interest are all adults and of sound mind. A sale made without a valid order, based upon a proper petition filed, and upon depositions taken as in chancery cases, is absolutely void, and confers no title; but, if the parties are all adults, and of sound mind, it is not necessary, in a collateral attack, that the record shall show that the proof was taken by deposition.

3. *Description of lands in petition.*—“Eighty acres of land, lying north of Courtland, and east of the Lamb’s Ferry road,” without other descriptive words in the petition, is not a sufficient description of the lands sought to be sold (Code, § 2450), but is void for indefiniteness and uncertainty.

4. *Averments of bill by purchaser, to compel conveyance of legal title.* When a purchaser, or sub-purchaser, of lands sold by an administrator under an order or decree of the Probate court, files a bill in equity in the nature of a bill for specific performance, seeking to obtain a conveyance of the legal title from the heirs, and to enjoin an action at law by a succeeding administrator, he must aver and prove the facts which give the court jurisdiction to order the sale; and the averment of mere legal conclusions—as, “appropriate allegations,” “proper parties,” “legal grounds,” etc.—is not sufficient.

5. *Proof of proceedings authorizing sale.*—When the averments of the bill are denied, the *onus* of proving the facts necessary to support the order and sale is on the complainant; and these facts are properly proved by a transcript from the record of the Probate Court, if in existence; and if the record has been lost or destroyed, it must be proved as other disputed facts are proved.

6. *Application of purchase-money to debts of estate; correspondence of allegations and proof.*—If the complainant fails to prove the facts necessary to sustain the validity of the sale, he can not have relief because the proof shows that the purchase-money was applied in paying the debts of the estate, when that fact is not averred in the bill.

APPEAL from the Chancery Court of Lawrence.

Heard before the Hon. THOMAS COBBS.

The bill in this case was filed on the 11th April, 1878, by Philip P. Gilchrist, against E. P. Shackelford, as the adminis-

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trator *de bonis non* of the estate of John J. McMahon, deceased, and the several heirs at law of said decedent; and sought to enjoin an action at law, which said administrator had brought against the complainant to recover the possession of a tract of land, and to compel a conveyance of the legal title to the land by the said heirs. The land was described in the bill, and in the complaint in the action at law, as "a tract of land near the town of Courtland, containing about eighty acres, more or less, and bounded on the north by lands of John B. Hawkins, on the east by the Courtland and Lamb's Ferry road, on the south by the graveyard and lands of E. P. Shackelford and Mrs. J. M. Swoope, and on the east by the lands of A. J. Sykes." The complainant held the land under a conveyance from John A. Gilchrist, and claimed that said John A. purchased it at a sale made by J. C. Baker, the administrator in chief of said McMahon's estate. As to this sale and purchase, the bill contained the following allegations:

"Your orator shows that, after the death of said John J. McMahon, J. C. Baker, then a citizen of said county of Lawrence, was duly appointed and qualified as the administrator of his estate; and, as such administrator, duly filed his petition in the Probate Court of said county, with appropriate allegations, and making proper parties, and on legal grounds asked of said court a decree for the sale of the lands sued for as above alleged, together with other large tracts of land, the property of said estate, and lying in said county. Said petition described the land now in controversy as 'eighty acres of land, lying north of Courtland, and east of the Lamb's Ferry road;' and complainant avers that the same was the only isolated tract of eighty acres belonging to said estate that [could] be appropriately so described; and said petitioner asked the decree of said court for the sale of said land, for one-third of the purchase-money to be paid [in cash, and the residue to be paid?] on the 1st day of January, 1861, with interest from the 1st January, 1860. Said petition was filed in August, 1859, and said decree was granted on the 10th October, 1859; and on said 10th October, 1859, said sale was advertised in the *Moulton Democrat*, a newspaper published in said county, in pursuance of an order of said court, describing said lands and town lots, the order of sale and the terms thereof, and signed by said Baker as administrator. Your orator further shows, that on the said 14th November, 1859, in pursuance of said decree and advertisement, said Baker, as administrator, did sell said lands so advertised; that said eighty acres of land above described was bid off at said sale and purchased by John A. Gilchrist, on the terms as advertised, at the price of — dollars per acre, aggregating the sum of \$2,000; that said Gilchrist paid one-third of said purchase-money in cash, and gave his note for the balance, pay-

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able January 1st, 1861, with interest from January 1st, 1860; that said Baker, as such administrator, duly reported the sale of said lands to said Probate Court on the 20th February, 1860, and said report was recorded by said court, and said sale was also duly approved. And complainant further shows, that the said John A. Gilchrist, after the maturity of the said note for the balance of the purchase-money, fully paid off and discharged the same, and said note was delivered up and surrendered to him by said Baker, with marks of cancellation and payment across the same by said Baker; but, the war coming on immediately after the maturity of said note, the further proceedings in said Probate Court, properly following the payment of said note, were not had in said court. So far as complainant knows or believes, said administrator never made any report of the payment of the balance of said purchase-money, nor was any application ever made for an order to make title to said John A. Gilchrist, and no title was ever made to him by said Baker. The records of the Probate Court of said county, during the time which embraces the entries aforesaid, were destroyed during the late war; so that your orator is unable to produce copies of the transactions above recited."

The bill contained, also, the following allegations: "Your orator further shows, that the taxes on said land for 1869 were not paid, and that for default thereof, on the 10th March, 1870, after all legal and regular steps by the assessor and collector of taxes, the said lands were sold by the tax-collector, the said tax being assessed to owners unknown; and at the sale thereof Thomas Masterson became the purchaser of said lands, for the sum of \$25, that being the tax, penalty, and expenses of the same, together with other lands in the same assessment; and the said Masterson, on the 10th March, 1872, transferred his certificate of purchase to your orator; and that on the 25th March, 1872, Hon. John A. McDonald, the probate judge of said county, executed a deed to your orator for said lands. The said original deed is lost, or mislaid, so that your orator can not find the same, though he has made diligent search for it, but the same is recorded;" and a copy was made an exhibit to the bill. This deed, as shown by the exhibit, recited that a quarter-section of land, particularly described by number, township and range, "was subject to taxation for the year 1869;" that said taxes remaining due and unpaid, on the 10th March, 1870, the tax-collector, "by virtue of authority vested in him by law, at an adjourned sale which was begun and held on the first Monday in March, 1870, did expose to sale at the court house in said county, in substantial conformity with all the requisitions of the statute in such case made and provided, the said real property above described, for the payment of the

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taxes, interest, penalties and costs then due and remaining unpaid;" that Masterson became the purchaser of said quarter-section, "which was the least quantity bid for," at the price of \$25, which he paid to the tax-collector; that Masterson afterwards transferred his certificate of purchase to said P. P. Gilchrist; that two years had elapsed since the sale, and the land had not been redeemed, &c.

The administrator answered the bill, denying all its material allegations as to the sale of the lands under the probate decree—that a proper petition was ever filed, or that the proper parties were brought in, or that the purchase-money was paid, &c.; and requiring strict proof of all these allegations. He also demurred to the bill, for want of equity, because it showed that the alleged order for the sale of the lands was void for uncertainty and indefiniteness in the description thereof; and because the complainant, if he acquired any title by his alleged purchase at the tax-sale, had an adequate remedy at law; and on several other grounds specifically assigned. The other defendants adopted the answer and demurrer of the administrator.

The complainant took the deposition of John A. Gilchrist, who testified, that he bought the land at a sale "conducted by said J. C. Baker, who claimed to act under a decree of the Probate Court;" that he paid one-third of the purchase-money in cash, according to the terms of the sale, and gave his note for the residue, as alleged in the bill; that this note was afterwards settled, by agreement between him, said Baker, and Robert G. McMahon, to whom the estate of said John J. McMahon was indebted, by his giving a draft on his commission-merchants in Huntsville, in favor of said Robert G. McMahon, and said Baker then delivered up his note, having written the word "*Settled*" across the face of it. He produced the note, which purported to be given for "second and last payment on the purchase of eighty acres of land north of Courtland;" and testified that the word "*Settled*," written across the face of it, was in the handwriting of said J. C. Baker. The defendants objected to the competency of this witness to testify as to any transactions between himself and said Baker, and moved to suppress those portions of his testimony.

The complainant also took the deposition of the probate judge of the county, who testified to the destruction of the records and papers of his office during the war, by the United States soldiers under Gen. Streight; and he appended to his deposition a certified transcript, purporting to contain "all the records of my [his] said office relating to the estate of John J. McMahon, having any connection with the sale of property of said estate." The following are the material portions of this transcript: "State of Alabama, Lawrence County. Probate

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Court, February Term, 1860. On the application of J. C. Baker, administrator of the estate of J. J. McMahon, deceased, it is ordered by the court, that the inventory of property and report of sale, as returned and sworn to by said administrator, be received and admitted to record, which is in the words and figures following, to-wit: Inventory of property belonging to the estate of J. J. McMahon, deceased, appraised, advertised, and sold by order of court, November 14, 1859. Terms of sale, one-third cash, January 1st, 1860; balance due January 1st, 1861, bearing interest from date. . . . Eighty acres of land north of Courtland, being a part of S. E. $\frac{1}{4}$ of section 18, T. 4, R. 4, sold to John A. Gilchrist, subject to survey, for \$30.01—\$2,400.80. On surveying these 4 acres, at \$30.01—\$120.04, to be secured by bill on Scruggs, Donegan & Co. . . . The land was not surveyed until the 14th February, three months after the sale; hence the delay in making the return. The land sold to Gilchrist, advertised as 80 acres, surveyed 84 acres. . . . I hereby certify, that the above statement of sale is correct." This was signed by Baker as administrator, and purported to be sworn to before a justice of the peace, but without date.

The complainant also offered in evidence the deed of the tax-collector, but adduced no evidence of the proceedings on which the sale was founded; and the defendants objected to the admission of the deed as evidence.

The chancellor overruled the demurrers to the bill, but dismissed it, on final hearing on pleadings and proof, on the ground that the complainant had failed to make out his case.

The decree dismissing the bill is now assigned as error.

D. P. LEWIS, and E. H. FOSTER, for appellant.—Though the evidence may not be sufficient to establish a valid petition and order of sale, the records having been destroyed, it is shown beyond controversy that a sale was made by Baker, as administrator, under proceedings had in the Probate Court; that Gilchrist became the purchaser, and paid the purchase-money; and that it was applied to the lawful purposes of the administration, in the payment of the debts of the estate. On these facts, there being no allegation or pretense of fraud, the purchaser may ask a court of equity to compel the heirs to make him a title, or to refund the purchase-money, even though the order of sale was void.—*Bland v. Bowie*, 53 Ala. 152-62; *Bell v. Craig*, 52 Ala. 117; *Pickens v. Yarborough*, 30 Ala. 408; *Smith v. Wert*, 64 Ala. 34. As bearing on other questions that may arise in the case, the following authorities are relied on: *Bigelow on Estoppel*, 514; *Maneely v. McGee*, 4 Amer. Dec. 105; *Griffith v. Townley*, 33 Amer. Rep. 476; *Grignon v. Astor*, 2 How. U. S. 340; *Thompson v. Tolmie*, 2 Peters, 162;

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Palmer v. Gurnsey, 7 Wendell, 248; *Decker v. Livingston*, 15 Johns. 479; 9 Wendell, 520; 1 Phil. Ev. §§ 703, 603; *Ib.* 675, note 2.

PHELAN & WHEELER, *contra*.—The testimony of John A. Gilchrist, as to his purchase of the land at a sale by Baker, and other transactions between him and Baker, was not competent evidence.—Code, § 3058; *Stallings v. Hinson*, 49 Ala. 92; 46 Ala. 580; *Alexander v. Hoffman*, 70 Ill. 114. There is no legal proof of any sale by the administrator under proper proceedings—no proof that any petition was ever filed, or any order of sale based on it. The case stands as if the land had been sold by the administrator without any order of court, and without any authority whatever; and such a sale is void.—*Ashurst v. Ashurst*, 13 Ala. 781; *Fambro v. Gantt*, 12 Ala. 298; *Bartee v. Tompkins*, 4 Sneed, 622. The decree and proceedings for the sale must be proved by the record, or a certified copy.—*Lyon v. Bolling*, 14 Ala. 753. If the record has been destroyed, the only remedy is to substitute the lost record.—*Bishop v. Hampton*, 19 Ala. 792; 2 Brick. Dig. 393-4. The proof failing to sustain the case made by the bill, the complainant can not have relief based on the application of the purchase-money; since, if that fact was fully proved, it is outside the allegations and prayer of the bill.

STONE, J.—The present bill was filed to enjoin an action of ejectment, and to obtain title to lands, in the nature of an application for specific performance. It rests on two distinct claims; first, purchase at tax-sale, and title derived thereunder. If Gilchrist acquired any title under that purchase and conveyance, it was and is purely legal, and can not aid the equity of the present bill. But neither the averments nor proofs of that sale and conveyance are sufficient to effect a divestiture of title for non-payment of taxes.—*Oliver v. Robinson*, 58 Ala. 46.

The main ground of relief is the alleged purchase at administrator's sale. On this question we feel constrained to hold, with the chancellor, that the complainant has failed to make out his case. The power in the administrator to sell the lands of his intestate is purely statutory; and unless he files a petition, containing the necessary averments to give the court jurisdiction, the Probate Court can make no valid order of sale. Save when the parties are all adults, and of sound mind, a sale made without an order of court therefor, based on a proper petition filed, and upon depositions taken in writing as in chancery cases, is absolutely void, and confers no title.—*Satcher v. Satcher*, 41 Ala. 26; *Pettus v. McLannahan*, 52 Ala. 55; *Robertson v. Bradford*, 70 Ala. 385. And even when the parties are all

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adults, and of sound mind, all the foregoing requisites must be conformed to, except that on collateral assault, it is not necessary that the record shall show that the proof was taken by deposition.

The averments of the present bill, as to what the petition to the Probate Court contained, are fatally defective. The description of the land in the petition for the order of sale, as averred in the bill, falls below the requirements of the statute. Code of 1876, § 2450. The language employed in this description is, "Eighty acres of land, lying north of Courtland, and east of the Lamb's Ferry road." The statute declares, the petition "must describe the lands accurately." The description, as averred in this bill, is void for uncertainty.

There are many other jurisdictional averments, necessary to a valid petition, which this bill fails to show were made. The petition, to be sufficient, must expressly state one of the statutory grounds authorizing a sale. Without this, the court never acquires jurisdiction to order a sale; and a sale made under an order, granted otherwise than on such petition, confers no title, legal or equitable. A bill, such as this, which seeks to perfect a title to lands purchased at administrator's sale, must expressly aver the existence of the facts which gave the Probate Court jurisdiction to order the sale; and they must be expressly averred, not as conclusions, but as specified facts. "Appropriate allegations," "proper parties," "legal grounds," are wholly insufficient. The bill should have set forth what were the allegations, who were the parties, and what was the ground on which the order was prayed.—*Robertson v. Bradford*, 70 Ala. 358; *Tyson v. Brown*, 65 Ala. 244. Sometimes these averments are supplied by making a transcript of the probate proceedings an exhibit to the bill, but that was not done in this case. And, when, as in this case, the averments of the bill are denied, the *onus* is on the complainant to prove them. This is done by the production of the probate record, properly authenticated, when it is in existence. If destroyed, it must be proved as other disputed facts are proved.—*McBryde v. Rhodes*, 69 Ala. 133; *Smith v. Wert*, 64 Ala. 34. Both the averments and proof in this case are wholly insufficient.

It is contended for appellant, that, even if the record fails to show the Probate Court acquired jurisdiction to order the sale, he is entitled to relief, because the estate got the benefit of the purchase-money, in having its debt cancelled to that extent. *Bell v. Craig*, 52 Ala. 215, and *Bland v. Bowie*, 53 Ala. 152, are relied on in support of this position. A complete answer to this argument is found in the fact, that the bill contains no averment to let in such proof. Relief can not be granted on

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allegations without proof, nor on proof without allegations.—1
Brick. Dig. 743, §§ 1538 *et seq.*

Affirmed.

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Bill in Equity for Reformation of Deed.

1. *Reformation of written instruments in equity.*—When, through mistake or fraud, a written instrument fails to express a material term of the real contract which the parties mutually intended to make, a court of equity will reform it, on clear and satisfactory proof, so as to make it express the true contract; and this relief will be granted, not only between the immediate parties to the contract, but also against creditors and purchasers chargeable with notice of the mistake; but not against innocent third persons who have acquired vested rights, and who can not be placed *in statu quo*.

2. *Same.*—On the facts of this case,—a father having conveyed by deed a house and lot to his married daughter, reciting only love and affection as its consideration, and not using any words which would exclude the marital rights of her husband; and an attachment against the father being afterwards levied on the property—the deed was reformed, against the husband, the father, and the attaching creditor, on averment and proof that the husband bought the property, paid a part of the price with moneys belonging to his wife, and conveyed it to her father, under a verbal agreement between the three that it should be conveyed to the wife as an equitable separate estate; and that it was not so conveyed through mistake on the part of the draughtsman.

3. *Same; voluntary conveyance; parol evidence as to consideration.* A voluntary conveyance is void as to the existing creditors of the grantor, and parol evidence is not admissible, at law, to contradict its recitals as to the consideration. Hence, the grantee, claiming that the deed was founded in fact on valuable consideration, would be without legal remedy against an attaching creditor of the grantor, and the levy of the attachment would be no obstacle to a reformation of the deed in equity.

4. *Same; who is bona fide purchaser; right of creditor to pursue moneys of debtor.*—The attaching creditor in such case, seeking to recover an antecedent debt due from the grantor, can not claim protection as a *bona fide* purchaser, against the equity of the grantee to have the deed reformed; nor can he claim that the deed is partly voluntary (and to that extent fraudulent and void as to him), because the grantor, his debtor, paid a balance of purchase-money due to the original vendor of the land, when it appears that he was bound on the note as surety for the purchaser, the husband of the grantee; nor can he assert any rights against the land, by subrogation or otherwise, on account of the moneys thus paid by his debtor.

APPEAL from the Chancery Court of Limestone.

Heard before the Hon. THOMAS COBBS.

The bill in this case was filed on the 26th April, 1876, by Mrs. Julia C. Sowell, a married woman, suing by her next
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friend, against Benjamin M. Sowell (her husband), Preston Capshaw (her father), and the partners composing the mercantile firm of Berry, Demoville & Co., a firm doing business in Nashville, Tennessee; and sought the reformation of a deed to a house and lot in the town of Athens, so as to make it show that it was not a voluntary conveyance (as on its face it purported to be), and to create in the complainant an equitable separate estate; and also an injunction against attachments which had been levied on the house and lot, as the property of said Capshaw, at the suit of Berry, Demoville & Co., as creditors of said Capshaw. The deed sought to be reformed, dated December 19, 1873, was executed by said Preston Capshaw, and conveyed the said house and lot to the complainant, on the recited consideration of natural love and affection for her. The said house and lot formerly belonged to one B. M. Townsend, and was sold and conveyed by him, by deed dated March 16th, 1870, to said B. M. Sowell, the complainant's husband. The consideration of this sale and conveyance was \$2,000, one half of which was paid in cash by said B. M. Sowell; and he gave his note for the residue, payable twelve months after date, with said Capshaw and another as his sureties. On May 22d, 1871, B. M. Sowell conveyed said house and lot to said Capshaw, on the recited consideration of \$2,000, by deed with covenants of warranty; and Capshaw conveyed it to the complainant, by deed dated December 19, 1873, the reformation of which was sought by the bill. When Sowell's note for the purchase-money remaining unpaid, \$1,000, fell due, or soon afterwards, it was paid or taken up by Capshaw, his surety, who paid \$600 in cash, and gave his own note for the residue, \$400; and he paid this note afterwards. In explanation of these transactions, and as grounds for a reformation of Capshaw's deed to the complainant as prayed, the bill alleged that, about the time when Sowell's note for \$1,000 became due, on which Capshaw was bound as his surety, the complainant's husband and father desired to have the property settled on her as an equitable separate estate, and to accomplish this object, by agreement between them and the complainant, she and her husband conveyed another lot in Athens to said Capshaw, in consideration of the payment by him of the amount due on the note to Townsend, and Sowell also conveyed to him the said house and lot involved in this suit, on his agreement to convey the property last mentioned to the complainant, by words which might create in her an equitable separate estate; and that by a common mistake on the part of the parties themselves, and through the ignorance or mistake of the draughtsman, the deed afterwards executed to her failed to express this intention and agreement. The attachment of Berry, Demoville & Co. was levied on the land

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on the 14th April, 1874, and was founded on a debt created in 1873, by a partnership of which Capshaw was a member; and the complainant alleged, "that said property was, at the time and long before the creation of said alleged debt, her separate property, and was in her actual possession, openly held and claimed by her, and purchased and paid for by means of her own and her husband's."

Capshaw and B. M. Sowell admitted the allegations of the bill, and made no defense. Berry, Demoville & Co. demurred to the bill for want of equity, assigning several specific grounds of demurrer; denied the alleged agreement and mistake, and required strict proof thereof; denied that they had any notice, actual or constructive, of said mistake and agreement, and claimed to be entitled to protection against it as *bona fide* purchasers without notice; and insisted that Capshaw's deed to the complainant, at least to the amount of the purchase-money paid by him to Townsend, was voluntary, fraudulent, and void as against them. The chancellor overruled the demurrer to the bill, and, on final hearing, on pleadings and proof, rendered a decree for the complainant. The overruling of the demurrer, and the final decree, are now assigned as error.

McCLELLAN & McCLELLAN, for appellants.—(1.) The legal title to the house and lot was vested in Capshaw by Sowell's deed to him, and that deed was duly executed and recorded. Capshaw's deed to Mrs. Sowell is a voluntary conveyance on its face, and is, therefore, fraudulent and void as against his existing creditors.—*Foote v. Cobb*, 18 Ala. 585; *Thomas v. DeGraffenreid*, 17 Ala. 602, and cases cited in 2d Brick. Digest, 21, § 100. (2.) Whether the purchase-money to Townsend was paid by Sowell or Capshaw, or partly by each, is immaterial; the complainant being, in either case, a mere volunteer, or gratuitous donee.—1 Story's Equity, §§ 706-7, 789-94; and cases collected in 1st Brick. Digest, 694, § 790. (3.) To authorize the reformation of a written instrument, on the ground of mistake, the proof must be certain, clear, conclusive, and satisfactory beyond a reasonable doubt.—*Campbell v. Hatchett*, 55 Ala. 548; *Clark v. Hart*, 57 Ala. 390; *Hubbard v. Allen*, 59 Ala. 283; *Lockhart v. Cameron*, 29 Ala. 355; *Rumbly v. Stainton*, 24 Ala. 712. The evidence here utterly fails to establish the mistake or mistakes, as alleged, and the admitted facts clearly negative any mistake. Sowell was the draughtsman of the deed, and he was a licensed attorney. That he should have conveyed the property to Capshaw, instead of conveying it directly to his wife, if he desired to create an equitable estate in her, was a very singular procedure, which ought to have been explained; and his acceptance of a deed from Capshaw, which,

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instead of stating the facts now set up, simply recites love and affection as its consideration, ought to have been explained, if at all susceptible of explanation. Add to this the averment of the bill, that the complainant knew nothing of these matters until within "about two months before the commencement of this suit" (from which it is a fair inference, that neither of these deeds was ever delivered to her), and belief in an honest mistake or mistakes, as alleged, requires great credulity. (4.) But all these transactions, when considered in connection with the insolvency of said Capshaw, his efforts to defeat the claims of his creditors by collecting his available assets, disposing of his property, and leaving the country, and the levy of an attachment on this property, are easily understood, and show an attempt to defraud creditors, which a court of equity will not countenance.—*Patton v. Beecher*, 62 Ala. 580-94; *May v. May*, 33 Ala. 203; *Brantley v. West*, 27 Ala. 542.

WALKER & SHELBY, *contra*, cited Story's Equity, vol. 1, §§ 136, 138, 156, 165, 166; *Larkins v. Biddle*, 21 Ala. 252; *Sawyer v. Harvey*, 3 Ala. 331; *Alexander v. Caldwell*, 55 Ala. 517; *Stone v. Hale*, 17 Ala. 564; *Whitehead v. Brown*, 18 Ala. 682; *Baskins v. Calhoun*, 45 Ala. 582.

SOMERVILLE, J.—It is a settled principle of equity jurisprudence, that where, by mistake, or fraud, a deed or other written contract fails to express any material term of the real agreement which the parties mutually intended to make, a court of equity will, on clear and satisfactory proof of such mistake or fraud, *reform the instrument*, so as to make it conform to the intention of the parties, and embody the actual or true agreement.—*Alexander v. Caldwell*, 55 Ala. 517; *Campbell v. Hatchett*, *Id.* 548. The aim of the court, in such cases, is to place the parties, as nearly as possible, in the situation they would have occupied but for the mistake.—Waterman on Specific Performance, §§ 368, 369.

And this jurisdiction to reform or rectify written instruments may be exercised as well against creditors, and purchasers having actual or constructive notice of the mistake, as between the immediate parties themselves.—*Dozier v. Mitchell*, 65 Ala. 511; *Baskins v. Calhoun*, 45 Ala. 582; *Williams v. Hatch*, 38 Ala. 338; 1 Story's Eq. Jur. §§ 165, 166. If, however, the parties can not be placed *in statu quo*, or if the mistake can not be rectified without impairing the vested rights of innocent third parties, having no notice of the mistake, the aid of equity will be withheld.—Waterman on Spec. Perf. § 384.

The present bill is filed to reform a deed to certain real estate, executed by the defendant, Capshaw, to the complainant, Mrs.

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Sowell, and dated December 19, 1873. Ancillary to this, an injunction is prayed against a writ of attachment levied upon the land by the appellants, Berry, Demoville & Co. No difficulty is presented as between the immediate parties to the deed. The bill alleges an agreement between Benjamin Sowell, complainant's husband, who is made one of the defendants to the bill, and his wife, the complainant, on the one part, and the defendant, Capshaw, on the other, that the husband should convey the property in controversy to Capshaw, in order that he might re-convey to the wife, in such manner, and with such apt words, as to constitute the property her separate estate by contract. Capshaw, who thus constituted himself a mere trustee, made this re-conveyance; but, by omission, ignorance, or mistake of the draughtsman, the consideration of the deed was recited to be mere *love and affection*, instead of a valuable one moving from the grantee and her husband, and the *apt words* necessary to describe or create the *separate equitable estate* were omitted. The parties are thus alleged to have executed an instrument, by common mistake, different from the one agreed on, and prejudicial to the rights of the complainant. These facts are admitted in the answers of both Capshaw, the grantor in the deed, and of Benjamin Sowell, the husband, who acted for his wife; and are, in our opinion, sustained by the evidence. The case is clearly one in which the equity of rectification, which is strictly in the nature of specific performance, can be invoked, unless there be some other ground of valid objection.

The remedy of Mrs. Sowell, in a court of law, was totally inadequate. The deed on its face purported to be a mere voluntary conveyance, which would be void as to the attaching creditors, whose debts existed at the time of its execution. It was incapable of being established by parol proof of a valuable consideration in a court of law, such evidence being inadmissible as tending to vary the legal effect of the instrument. The only remedy, in such cases, is a bill in equity filed with the view of its reformation.—Kerr on Fraud & Mis. 191-2; *Hubbard v. Allen*, 59 Ala. 283.

The levy of the attachment was no obstacle to the reformation of the deed conveying the attached property to the complainant. The equity of Mrs. Sowell, arising from the purchase of the house and lot in question with her money, was superior to the lien acquired by the levy of the attachment, whether the attaching creditors had notice of such equity or not. The attachment could only reach the *actual interest of the defendant* in attachment, whatever that might be, and is no impediment to the assertion of all equities previously existing as incumbrances on the property.—Drake on Attachments, § 223; Freeman on Judg. §§ 356-7. Nor can an attaching

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creditor claim protection as a *bona fide* purchaser, as he seeks to recover an old debt, and parts with no present consideration. *Depeyster v. Gould*, 29 Amer. Dec. 723; *Rogers v. Adams*, 66 Ala. 600. The same rule was applicable, in this State, to the liens of judgment creditors, until it was expressly abrogated by statute.—*Coster v. Bank of Georgia*, 24 Ala. 37; *Preston & Stetson v. McMillan*, 58 Ala. 84; Code of 1876, §§ 2199, 2200; Freeman on Judg. §§ 356–7.

The evidence shows that the complainant was in possession of the premises, and that the deed from Capshaw to her, here sought to be reformed, was executed and recorded before the levy of the attachment sued out by appellants. The original vendors, Townsend and wife, conveyed to Benjamin Sowell, in March, 1870, for a consideration of two thousand dollars. Of this sum, one thousand dollars was paid in cash; and the note of Sowell was given for the balance, upon which *Capshaw became one of the sureties*. Capshaw afterwards became indebted to Sowell, in the sum of about six hundred dollars, for a lot of land in the town of Athens, which he paid upon the debt to Townsend; and he also paid out of his own funds the balance of the purchase-money, amounting to about *four hundred dollars*. It is insisted that this was a donation to the complainant, his daughter, to whom he conveyed the house and lot, as above stated, in December, 1873, and that the conveyance was, therefore, fraudulent. If the premise be true, the conclusion would follow, at least so far as to render the deed constructively fraudulent, and the grantee would be constituted a trustee *in invitum* to the extent of the gift; such being the principle governing voluntary conveyances.—Bump on Fr. Conv. 303. But we are not at liberty to regard the transaction in this light. The four hundred dollars in question was paid by Capshaw, pursuant to a previous obligation entered into as *surety for Benjamin Sowell*. It was not, therefore, a gift to the complainant, but money paid by request for the use of the principal, Sowell, against whom an action of *assumpsit* would lie at the instance of Capshaw. So, a garnishment might lie against him, as the debtor of Capshaw, in favor of the appellants. These conclusions are utterly in conflict with the theory of a gift to complainant.

The fact that the money, paid by the surety for the principal, was invested by the latter in the lands purchased for complainant, confers no right upon the appellants, as creditors, to pursue the fund into the investment. Such investment, standing alone, raises no equity in favor of the creditors of the surety, either by subrogation or otherwise. Such, at least, is the doctrine of this court as established by its past decisions. *Foster v. Trustees of Athenæum*, 3 Ala. 302; *Knighton v. Curry*, 62 Ala. 404.

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The decree of the chancellor must, under these principles, be affirmed.

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Garnishment on Judgment; Amendment of Judgment nunc pro tunc.

1. *Judgment against garnishee; recital of judgment against defendant.* A garnishment on a judgment being consequential and auxiliary only, the final judgment against the garnishee must recite the fact and amount of the judgment against the original defendant.

2. *Amendment of judgment nunc pro tunc.*—At common law, a judgment could not be amended after the expiration of the term at which it was rendered; and while the statutory provisions authorizing the correction of errors or mistakes after the expiration of the term, on record or quasi-record evidence (Code, § 3154), have been liberally construed, they are confined to clerical errors or mistakes, leaving judicial errors to be corrected by appeal.

3. *Same; what are clerical errors.*—In the entry of a final judgment against a garnishee, it is the duty of the clerk to recite the fact and amount of the original judgment against the defendant; and his failure to do so is a clerical error, which may be corrected *nunc pro tunc* at a subsequent term.

APPEAL from the Circuit Court of Limestone.

Tried before the Hon. H. C. SPEAKE.

The appellants in this case, J. & L. Whorley, recovered a judgment by default against William Greet, at the April term, 1874, and a writ of inquiry as to the damages was ordered, to be executed at the next term; and at the next term, on the execution of the writ, the damages were assessed at \$195.47. On this judgment a garnishment was sued out on the 29th of September, 1877, and was served on the Memphis & Charleston Railroad Company as the debtor of said Greet. The garnishee filed an answer, admitting an indebtedness to said Greet to the amount of \$162.50; and judgment was thereupon rendered against said garnishee, at the May term, 1879, for that amount with costs against the defendant; but this judgment did not recite the fact or the amount of the original judgment. Afterwards, in vacation, the plaintiff entered on the docket a motion to amend this judgment, *nunc pro tunc*, "by reciting in substance the existence, date, amount and parties to the judgment rendered in said cause against said William Greet;" and this motion coming on to be heard at the next term, they offered in evidence, in sup-

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port of their motion, the original judgments against Greet, the affidavit and garnishment, the answer of the garnishee, and all the proceedings in the cause shown by the record. The court excluded all this evidence as offered, on objections interposed by the garnishee, and overruled the motion to amend the judgment. The plaintiffs duly reserved exceptions to these several rulings, and they now assign the same as error.

R. A. McCLELLAN, with RICE & WILEY, for appellants, cited *Jackson v. Shipman*, 28 Ala. 488; *Faulks v. Heard & Due*, 31 Ala. 516; *Curry v. Woodward*, 44 Ala. 305; *Bonner v. Martin & Lowe*, 37 Ala. 83; *Ford v. Tinchant*, 49 Ala. 567; *Blair v. Rhodes*, 5 Ala. 648; *Drake on Attachment*, 658.

HUMES & GORDON, *contra*.—A garnishment is the institution of a new suit, and is governed by the general rules applicable to other suits; and though it be consequential to the original suit, the judgment against the original defendant is no part of the record in the garnishment proceedings, unless made so in proper manner.—*Drake on Attachments*, § 452; 1 Brick. Dig. 173, § 277; *Pearce v. Winter Iron Works*, 32 Ala. 72. In this case, the original judgment against the garnishee makes no reference or allusion whatever to the judgment against the original debtor, and the record nowhere shows that that judgment was brought to the notice or knowledge of the court, as a part of the case against the garnishee. The motion to amend *nunc pro tunc* proposed to supply this defect; not by showing from record evidence, or *quasi*-record evidence, that the clerk did not enter correctly the judgment actually rendered by the court; but by adding to the judgment which the court actually rendered, and supplying omissions which were fatal to that judgment. This is not the correction of a clerical misprision, and the court properly refused to allow it.—*Van Dyke v. State*, 22 Ala. 57; *Curtis v. Gaines*, 46 Ala. 455; *Ex parte Cresswell*, 60 Ala. 378; *Pettus v. McClanahan*, 52 Ala. 55-8; *Daviess County v. Howard*, 13 Bush, Ky. 105; *Hall v. Williams*, 10 Me. 290; 1 Ohio, 375; 12 Mart. La. 358; *Taylor v. Harwell*, 65 Ala. 1; *Nabors v. Meredith*, 67 Ala. 333; *Nolan v. Locke*, 16 Ala. 52; *Gibson v. Wilson*, 18 Ala. 63; 3 Tenn. Ch. 137; 3 Cal. 155; *Armstrong v. Robertson*, 2 Ala. 164; *Benford v. Daniels*, 13 Ala. 667; *Burt v. Hughes*, 11 Ala. 571; *Harris v. Martin*, 39 Ala. 556; *Draughan v. Bank*, 1 Stew. 66; 8 Mo. App. 290; 74 N. C. 597.

BRICKELL, C. J.—A garnishment, issued as a remedy to obtain satisfaction of a judgment, is strictly statutory, and is, in some respects, a new suit; yet, it is essentially consequential,

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and auxiliary to the judgment.—*Blair v. Rhodes*, 5 Ala. 548; *Hopper v. Todd*, 8 Ala. 121; *Case v. Moore*, 21 Ala. 758; *Jackson v. Shipman*, 28 Ala. 488. It can not issue from any other court than that in which the judgment was rendered. *Hopper v. Todd, supra*. Like an execution upon the judgment, it must issue in the name of the plaintiff in whose favor the judgment was rendered, though he may not be the real and beneficial owner; for, as is said, the “suit is consequential to the judgment in the principal case, is designed as a remedy for its collection, and must be commenced and prosecuted in the name of the plaintiff in that judgment, no matter who may be its real owner.”—*Jackson v. Shipman, supra*. If the judgment has been satisfied, and the satisfaction appears of record, so that an execution can not issue, a garnishment can not issue, though the fact may be the satisfaction proceeded from a stranger, for whose use the judgment was to be kept open.—*Thompson v. Wallace*, 3 Ala. 132. As it is a dependency of the judgment, it is essential to the regularity of a judgment against the garnishee, that in it should be recited the fact and amount of the recovery against the original defendant; otherwise it can not be known that the plaintiff stands in a relation which entitles him to pursue the remedy, nor that he is entitled to recover the amount that the garnishee is condemned to pay.—1 Brick. Dig. 183, § 431. The judgment originally rendered against the garnishee in this case, not reciting the fact and amount of the recovery against the defendant, was therefore defective and irregular.

2. At the common law, courts were not authorized to amend judgments after the close of the term at which they were rendered. It was only while the proceedings were in *per*, that the right and authority of amendment existed. Judgments and records are not, therefore, amendable at a subsequent term, except in pursuance of statutory provisions, or when there is matter of record upon which the amendment may be based—“when there is some memorial, paper, or other minute of the transactions in the case, from which what actually took place can be clearly ascertained and known.”—*Albers v. Whitney*, 1 Story, 317. The statute (Code of 1876, § 3154) requires the amendment of clerical errors or mistakes in final judgments, upon the application of either party, when there is sufficient matter apparent on the record or entries of the court to make the amendment. The construction of the statute has been liberal, and, while the courts have rigidly adhered to the requisition, that the evidence upon which the amendment is based must be of record, or *quasi* of record, not resting in parol, all amendments in furtherance of justice, making the record speak the whole truth of the transaction, have been allowed. The omission, mistake, or errors of the clerical officer of the court, have

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not been permitted to prejudice suitors, when the evidence for their correction was found upon the records. The correction is, however, of clerical errors—it is not of the express judgment the court may have pronounced. It is in respect to an error or defect in the entry of the judgment the court rendered; the omission of the statement of a fact the parties are entitled to have spread upon the record, or, it may be, expunging the statement of a fact incorrectly or impertinently introduced. The clerical duty is the entry of the judgment the court renders, however erroneous it may be; and if the duty is performed, the correction of the error must be made in an appellate court. But, when the judgment rendered is not entered, or the wrong judgment is entered, upon proper evidence the error will be corrected, and the appropriate judgment entered.

3. The recitation of the fact and amount of the recovery against the defendant, in the entry of the judgment against the garnishee, is the duty of the clerk, as is the recitation of the judgment *nisi* in correspondence with the recognizance.—*Governor v. Knight*, 8 Ala. 297; *State v. Craig*, 12 Ala. 363. The omission of the recitation may be corrected on motion, and the Circuit Court was in error in refusing to order the correction, and the entry of the appropriate judgment.

Reversed and remanded.

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Supersedeas of Execution on Probate Decree against Sureties on Administration Bond.

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135	520

1. *Conclusiveness of decree.*—In a proceeding to enforce a decree rendered in favor of a guardian for the use of his ward, by summary execution against the sureties on the defendant's bond as administrator, the recitals of the decree are conclusive as to the fact of the guardian's appointment and its regularity, and they can not be impeached or questioned.

2. *Non-residence of guardian.*—The fact that a guardian is a non-resident when a decree is rendered in his favor, for the use of his ward, does not justify the inference that he was also a non-resident at the time of his appointment, but the court will presume, if necessary, that he changed his residence after his appointment; and even if he was a non-resident when appointed, the appointment would not be void, but only irregular and voidable.

3. *Revivor of decree, and conclusiveness of revived decree.*—A void decree can not be revived; consequently, in a proceeding to enforce satisfaction of a decree which has been revived, the validity of the original decree can not be assailed.

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4. *Same; conclusiveness of decree against administrator, as against his sureties.*—A decree rendered against an administrator, on final settlement of his accounts, is equally conclusive on his sureties, in the absence of fraud or collusion, as to the matters of account, but not as to the *factum* of the bond, or other defenses personal to the sureties; and when such decree is revived against the administrator, the revivor is equally conclusive on his sureties, except as to such personal defenses, although they were not parties to such revivor, and had no right to appear and defend against it.

5. *Statutes of limitation; rule of construction.*—Statutes of limitation are enacted in the interest of repose, and rest on the presumption that meritorious claims will not be allowed to slumber until human testimony is lost, or human memory fails; and their remedial provisions are never construed strictly.

6. *Limitation of 'action' against sureties on administration bond.* Under the statute which prescribes six years as the limitation of "actions against the sureties of executors, administrators or guardians, for any misfeasance or malfeasance whatever of their principal, the time to be computed from the act done or omitted by their principal which fixes the liability of the surety" (Code; § 3226, subd. 7); the word *actions*, being liberally construed, includes a summary execution against the surety, on the return of 'No property found' on an execution issued on a decree against his principal; the statute begins to run from the rendition of the decree against the principal; and when the decree is revived, no execution having issued on it before revivor, the statute is available to the sureties as a defense against a summary execution on the revived decree, issued more than six years after the rendition of the original decree.

APPEAL from the Probate Court of Jackson.

Tried before the Hon W. L. MARTIN, Register in Chancery, sitting *pro hac vice* for the Probate Judge, who was disqualified by interest.

In the matter of a petition filed in said Probate Court on the 16th September, 1882, by J. F. Martin, William B. Keeble, George W. R. Larkin, William R. Larkin, and John Compton, seeking to supersede and quash an execution which had been issued against them from said Probate Court, on the 1st August, 1882, as sureties on official bonds given by James M. Buchanan, as administrator of the estate of Winfield S. Mason, deceased. There were two bonds given by said administrator; the first dated in March, 1862, which recited a grant of administration *de bonis non* to said Buchanan and Mrs. Frances S. Mason jointly, and on which said J. F. Martin and W. B. Keeble were sureties; and the second dated March 23d, 1863, which was given after the death of Mrs. Frances S. Mason, on the requisition of the probate judge acting *ex mero motu*, and which was signed by said John Compton, William R. Larkin and Geo. W. R. Larkin, as sureties for said Buchanan as sole administrator. The execution was issued against the sureties on both of these bonds, and recited the issue of a former execution against the administrator alone, and its return "No property found;" and the decree on which said executions were

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issued was described in each of them. A former execution against these sureties, issued in January, 1882, was returned May 8th, "No property found, as to James M. Buchanan; and as to the other defendants, returned under restraining order from the Chancery Court of Jackson county;" and the execution now sought to be superseded was issued after the final decision of that chancery case, by this court on appeal, at the last term. *Larkin v. Mason*, 71 Ala. 227.

The original decree against said Buchanan, on which said executions were based, was rendered by said Probate Court, on the 8th April, 1868, on final settlement of his accounts as such administrator, "in favor of B. W. Mason, as the guardian of Frances W. Mason, a minor, who was an heir-at-law of said W. S. Mason, deceased;" and in March, 1878, this decree, on which no execution had been issued, was revived against said administrator, in favor of John B. Tally, as the administrator of the estate of said Frances W., who died in January, 1870, intestate, unmarried, and during her minority. These decrees, and the material facts stated in them, were also stated in the executions. The petitioners sought to supersede the execution against them, and to have the decree entered satisfied as to them, on the ground of payment and satisfaction, in whole or in part, and because all remedy against them was barred by the statute of limitations. There was a demurrer to the petition, which the court overruled; and other pleadings were had, which it is unnecessary to notice. On hearing of the cause on pleadings and evidence, the court held that the petitioners were not entitled to the relief prayed, and therefore dismissed their petition, at their costs. The petitioners excepted to this judgment and decree, and they now assign it as error.

ROBINSON & BROWN, for appellants.—The statute of limitations of six years was a complete bar to the enforcement of the decree against these petitioners, as the sureties of the administrator.—Code, § 3226, subd. 7. As to them, the statute began to run from the rendition of the original decree against their principal, which was the judicial ascertainment of his default.—*Fretwell v. McLemore*, 52 Ala. 136; *Rives v. Flinn*, 47 Ala. 481; *Ward v. Yonge*, 45 Ala. 474. That the statute applies in such a case as this, see *Ragland v. Calhoun*, 36 Ala. 607. The infancy of the ward at the time the decree was rendered, if her administrator could in any case set it up against the bar created by the statute of limitations, can not avail him here, since the guardian was barred; and the general rule is, that when the trustee is barred, the beneficiary is also barred. *Tif. & Bullard on Trusts*, 720, sec. 7; *Williams v. Otey*, 8 Humph. 563; 10 Geo. 359.

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HUNT & CLOPTON, and W. H. NORWOOD, *contra*.—(1.) The defenses which the sureties now set up, if founded in fact, ought to have been pleaded to the proceeding to revive the decree, and it is now too late to present them. The revivor of the decree, like the original decree itself, concludes the sureties as well as their principal; and though they were not parties to either decree, they might have been made parties on their own motion, and are as much concluded by the decree as if they had in fact intervened.—*Hailey v. Boyd's Adm'r*, 64 Ala. 399; *Grimmett v. Henderson*, 66 Ala. 521; *Gravett v. Malone*, 54 Ala. 19; *Williams v. Howell*, 4 Ala. 693. (2.) There is no statute of limitations applicable to this case, and the statute of six years certainly does not govern it. The statute never begins to run, until there is some one capable of suing and being sued.—2 Brick. Dig. 220. § 35. The statute did not run against the plaintiff's intestate, because she was an infant when the decree in her favor was rendered, and died in infancy; and infants are expressly excepted from the operation of the statute. The interposition of B. W. Mason as her guardian, and his failure to enforce the decree, if he could have done so, would not affect her rights. — *Wallis v. Moore*, 18 Ala. 458–63. But the original decree itself recites, that it is shown to the satisfaction of the court, “by properly authenticated evidence filed of record, that B. W. Mason, of the county of Giles, in the State of Tennessee, is the legal guardian of the said minor,” and one of the admitted facts, as shown by the agreement entered of record, is, “that said B. W. Mason received his appointment as such guardian in Giles county, Tennessee, and continued to act in that capacity up to the death of his said ward.” A foreign guardian, who is not shown to have complied with any of our statutory requirements, had no right to sue out execution on the decree, and could have no standing in our courts.—*Smith v. Wiley*, 22 Ala. 396; *Smith v. Smith*, 13 Ala. 329; 1 Wms. Ex'rs, 356.

W. L. BRAGG, also of counsel for the appellee, submitted a written argument on the statute of limitations, of which the following is a brief synopsis:—By virtue of the relation and privity existing between an administrator and the sureties on his bond, a decree rendered against him, on final settlement of his accounts, is equally conclusive on them, unless they can show it was obtained by collusion and fraud.—*Freeman on Judgments*, § 180; 4 Ala. 693; 16 Ala. 9; 19 Ala. 228; 36 Ala. 606; 60 Ala. 115; 61 Ala. 480. It is also conclusive as to assets.—*Kyle v. Mays*, 22 Ala. 692. Such a decree may be revived by *scire facias*.—Code, §§ 3174–75; 3 Ala. 223; 32 Ala. 502. The law governing such revivor, the mode of procedure, and the effect of the decree when revived, are the same

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as in other cases; there being no exception, or special provision, in favor of such sureties. In such proceeding to revive, the decree on its face imports absolute verity, and it can not be impeached by any matter going behind it.—16 Ala. 95; 22 Ala. 150. The revived decree has all the force and effect of the original decree, and is equally conclusive on the sureties, but subject, of course, to their right to show payment or release after the rendition of the original decree, or that it would not have supported or authorized an execution; and they may intervene and make themselves parties to the proceeding to revive, for the purpose of setting up these defenses, as on the final settlement they might.—*Hailey v. Boyd*, 64 Ala. 399; *Baines v. Barnes*, 64 Ala. 375; *Garrett v. Garrett*, 69 Ala. 429. Whether they intervene or not, they are equally concluded by the decree. When a decree is rendered against an administrator, on final settlement of his accounts, three different statutes of limitation come into operation from that date: 1st, six years, as the limitation to an *action* on the bond against the sureties (Code, § 3226, subd. 7); 2d, twenty years, as the limitation to an *action* on the decree (Code, § 3223, subd. 2); 3d, ten and twenty years, as the limitation to a revivor of the decree, to be determined by the issue of an execution on it within ten years (Code, §§ 3173–75). These several statutes relate only to the remedies prescribed by them respectively, and neither of them extinguishes the debt.—*Ware v. Curry*, 67 Ala. 284–89. When several remedies are given by law for the enforcement of a debt, the fact that one of them is barred is no defense to the others.—*Ivey v. Owens*, 28 Ala. 642; *Ware v. Curry*, 67 Ala. 284; *Chapman v. Lee*, 64 Ala. 483; *Godsey v. Bason*, 8 Ired. 264. The limitation of six years is prescribed only for *actions*, and it can not properly be extended by construction to *executions*. An action is a civil suit, commenced by summons and complaint; an execution is final process for the collection of a judgment or decree. The two are widely distinct in meaning, and have no common field of operation. An execution may issue against the sureties of an administrator, “*whenever an execution for money has issued against him from the Probate Court, and has been returned unsatisfied.*”—*Jewett v. Hoogland*, 30 Ala. 718–21. The case of *Fretwell v. McLemore* (52 Ala. 136), and others cited for appellants, were *actions* on administration bonds, and have no application.

STONE, J.—In August, 1861, Winfield S. Mason died intestate, a resident of Jackson county, Alabama. In March, 1862, Frances S. Mason and James M. Buchanan were appointed administrators of his estate, and gave bond, with Wm. B. Keeble and Johnson F. Martin as their sureties. Mrs. Frances

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S. Mason died in 1863, and no settlement of her administration was ever had. It is not shown she had any separate administration account. Buchanan continued in the administration. In March, 1863, after the death of Mrs. Mason, the judge of probate, of his own motion, required Buchanan, the administrator, to give an additional bond; and he gave such bond, with W. R. Larkin, John Compton, and Geo. R. Larkin, as his sureties. James E. Mason and Frances W. Mason, infants of tender years, were the heirs-at-law and distributees, alike of Winfield S. Mason and Frances S. Mason. One Hopkins became administrator of Frances S. Mason, she having died intestate.

In April, 1868, James M. Buchanan made a final settlement of his administration of Winfield S. Mason's estate, in the Probate Court of Jackson county,—said James E. and Frances W. being still minors. His accounts were audited and stated, and a balance of some thirty-one hundred dollars was found in his hands for distribution. This sum was divided into three parts, and decrees were then rendered against said Buchanan, for the several thirds; one in favor of Hopkins, as the administrator of Frances S. Mason, the widow; one in favor of B. W. Mason, as the guardian of James E. Mason, minor, for the use of said James E. Mason; and one in favor of B. W. Mason, guardian of Frances W. Mason, minor, and for her use. The decree last mentioned—that in favor of B. W. Mason for the use of Frances W. Mason—is the subject of the present controversy. No execution was issued on that decree, until after the revivor hereinafter stated.

Said Frances W. Mason having died a minor, John B. Tally was appointed her administrator; and in March, 1878, pursuant to a motion and notice therefor, said decree, so rendered in 1868, in favor of B. W. Mason, guardian of Frances W. Mason, and for her use, was revived in favor of said Tally, as her administrator. An appeal had been taken to this court, pending the proceedings, and questions of law were settled, which entered into the question of revivor.—*Mason v. Buchanan*, 62 Ala. 110. An execution against Buchanan was issued on said revived judgment, in July, 1878, which was returned in November following, "No property found." This was the first execution issued against Buchanan on said decree, either before or after the said decree of revivor. In January, 1882, an execution was issued on said revived decree, and on the return 'No property' made on said first execution, against said Buchanan, and against his sureties on both said bonds. Thereupon, said sureties obtained a *supersedeas* of said execution, as against them, and, among other defenses, pleaded the statute of

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limitations of six years, as a bar to the proceeding against them. This defense was disallowed by the Probate Court.

It is shown in the record, that when the decree was rendered, B. W. Mason, the alleged guardian, was a resident of the State of Tennessee. It is not shown when or where he was appointed, nor is it shown he ever had been appointed such guardian, further than the recital in the decree that he was such guardian of said Frances W. Mason. There is nothing in the objection based on these facts. The recital in the decree, affirming that he was guardian, proves the fact, in a collateral presentation, such as this.—*Florentine v. Barton*, 2 Wall. 210. Judgments and decrees of courts, pronouncing the existence of collateral facts material to their regularity, are presumed to be correct. Nor can we presume said B. W. Mason was a non-resident of Alabama, at the time he was appointed guardian. There is nothing in the record to raise such presumption; and, if necessary, we would presume he was a resident when appointed, and changed his residence afterwards. We may go further: If he was non-resident when appointed, the appointment was not void. It was, at most, irregular, and would stand, until revoked.—*Buchanan v. Tally*, at the last term; *Broughton v. Bradley*, 34 Ala. 694; *Brock v. Frank*, 51 Ala. 85.

There is another view, which is a full answer to any argument that may be based on the non-residence of the guardian, in whose name the original decree was pronounced. That original decree is the foundation, on which the decree of revivor stands. If it was void, it could not be vitalized by an order of revivor. Revivors restore life to judgments and decrees that have become dormant. They restore that which has been lost by neglect. If there was no previous living existence, there can be no restoration. The revivor and execution, in this case, estop the appellee from gainsaying the validity of the decree, on which the whole proceeding rests.—*Buchanan v. Tally*, *supra*.

It is contended for appellee, that the petitioners, sureties on the bonds, should have had themselves made parties with Buchanan in the probate proceedings instituted to revive the decree, and should then and there have interposed the defense of the statute of limitations. Failing to do so, the argument is, that they, together with Buchanan, are concluded by the decree. There can be no question that the decree, both original and revived, rendered against Buchanan, is equally binding on his sureties, as to all matters that are not personal defenses. This grows out of our statutes, which make it the duty of the administrator, imposed by his bond, to make settlement of his administration. Hence, the state of the accounts, ascertained

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and decreed against the personal representative himself, is alike conclusive on him and his sureties, in the absence of fraud and collusion. Not so, however, as to the *factum* of the bond, and the surety's liability upon it. These are questions which can not arise on a mere proceeding to bring the administration to a settlement, to which the sureties are not parties.—*Grimmet v. Henderson*, 66 Ala. 521; *Larkins v. Mason*, 71 Ala. 227. The proceeding in this case was against Buchanan alone, and its purpose was to revive the decree previously rendered against him. To such proceeding the limitation is twenty years. The sureties had neither power nor right to appear or defend against this proceeding. The fact and extent of their principal's liability had been fixed by the decree of 1868, and that decree equally fixed their liability at that time, with the exception of personal defenses. In the state of the record, any defense they could have made could not have availed Buchanan, their principal.—See *Garrett v. Garrett*, 69 Ala. 429; Code of 1876, § 3224, subd. 2; 1 Brick. Dig. 925, §§ 153-5.

Section 3226 of the Code of 1876, subd. 7, declares a limitation of six years to "actions against the sureties of executors, administrators or guardians, for any misfeasance or malfeasance whatever of their principal; the time to be computed from the act done or omitted by their principal, which fixes the liability of the surety."

Payment of the decree rendered in this cause by the Probate Court, was the act omitted to be done. Our uniform rulings are, that the rendition of a decree for money, on final settlement of an executor, administrator or guardian, fixes the liability of the surety.—*Fretwell v. McLemore*, 52 Ala. 124-36; *Wright v. Lang*, 66 Ala. 389. As soon as the decree was rendered, it became the duty of the administrator to pay it; and failing to do so, an action lay at once against his sureties. The breach, in such case, is the non-payment by their principal, of the amount of the decree.—1 Brick. Dig. 925, §§ 147, 152. The right of action accrues then, because it is the duty of the principal to pay; and the sureties may then pay, and charge their principal for the breach in not paying. Such payment by the sureties could not be classed as voluntary.

It is contended for the appellee that, inasmuch as the statute employs the word *actions*, in prescribing the limitation we are considering, it can not be applied to this case, because the present statutory proceeding is in no sense an action; that the issue of an execution, which is final process, can not be the commencement of an action, whose initiatory step is an original process. In *Steele v. Graves*, 68 Ala. 17, following former rulings, we said: "The right to have execution against the sureties, is statutory. It is a substitute for a suit on the bond for non-payment

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by the administrator of the decree against him."—See *Elliott v. Mayfield*, 4 Ala. 417, 424. Now, it could not be controverted, that if suit had been brought against the sureties, alleging non-payment of the decree as the breach of the bond, the six years statute of limitations would have been a good plea in bar. Cases frequently arise, in which the statutory remedy can not be resorted to. If the administrator dies before settlement, and the settlement is consequently made by his personal representative, the statutory remedy by execution can not be invoked. To any proceeding in such case, the statute might be pleaded by the sureties. Would it not be strange that, in two cases, in all other respects parallel, the accidental death of one principal would release one set of sureties, and leave the others liable? We think the construction claimed is too literal and narrow. Statutes of limitation are enacted in the interest of repose. Their remedial provisions are never construed narrowly. They rest on the presumption that meritorious claims will not be allowed to slumber, until human testimony is lost, or human memory fails.

Our interpretation of the statute is, that the word *actions* can not be construed in any technical sense, but that it embraces all civil proceedings instituted or set on foot, to enforce the liability. Mr. Bouvier says: "In a quite common sense, *action* includes all the formal proceedings in a court of justice, attendant upon the demand of a right made by one person or party of another in such court, including an adjudication upon the right, and its enforcement or denial by the court." This, whatever its form, if not asserted against the surety until more than six years after the liability of the principal is fixed by decree, may be successfully defended by interposing the plea of the statute.

All the facts in this case are before us, and there is no necessity for remanding the cause.

The decree of the Probate Court is reversed, and a decree is here rendered, superseding and quashing the execution, so far as the sureties on the two bonds are concerned; and no other execution will issue against them on said decree.

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Bills in Equity by Creditors, for Marshalling Securities.

1. *Marshalling securities as between creditors.*—When one creditor has a lien upon two distinct funds, and another creditor has a lien upon one of them only, a court of equity will, at the instance of the latter, compel the former creditor to exhaust the separate fund before resorting to the fund common to both; but, whether this principle applies to a lien acquired by the service of an attachment or garnishment at law, is not decided.

2. *Attachment and garnishment; what demands may be reached.*—Proceedings by attachment and garnishment, in courts of law, are purely of statutory origin, and can operate only on the legal rights of the defendant in attachment—that is, such rights as he could enforce by action at law in his own name; and money in the hands of a garnishee can not be reached, unless the defendant himself could recover it of the garnishee by action of debt or *indebitatus assumpsit*.

3. *Assignments of policy of life-insurance; garnishment against first assignee, after assignment of surplus.*—The holder of a policy of life-insurance having transferred it as collateral security to one of his creditors, and afterwards assigned his interest in the residue to a second creditor, other creditors can not, by garnishment subsequently sued out against the first assignee, reach the surplus remaining in his hands after the secured debts have been paid; nor can they maintain a bill in equity, the money having been paid into court by the garnishee, to compel the second assignee to exhaust other securities held by him before resorting to the surplus.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. JOHN A. FOSTER.

These two cases were consolidated by the order of the chancellor in the court below, and were argued and considered as one case. The bills were filed on the 11th March, 1880,—one by the Alabama Gold Life Insurance Company, a domestic corporation, and the other by Frank S. Horton—against George G. Duffee and William Henderson; and sought to enjoin said Henderson, as the assignee of Duffee, from proceeding further at law to claim a fund, which had been deposited in court by Joseph Steiner, as garnishee, in suits instituted by the complainants respectively against said Duffee; and to compel him to first exhaust other securities alleged to be held by him for the payment of his debt, in order that the complainants might obtain, out of the said fund, satisfaction of the judgments

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which they had recovered in their said actions at law against Duffee.

The suit in favor of the Alabama Gold Life Insurance Company against Duffee was commenced on the 12th August, 1879; and a garnishment was sued out against Steiner, as the debtor of Duffee, which was served on the garnishee on the 13th August, 1879. The action in favor of Horton was also commenced on the 12th August, 1879; and a garnishment was sued out against Steiner, which was served on him on the 14th August. In each case, judgment by default was rendered against Duffee, the defendant in the original suits, on the 22d November, 1879. The garnishee, in each case, filed an answer, substantially the same; stating, among other things, that Duffee became indebted to him on the 26th August, 1877, by promissory note for \$1,458, and, to secure the payment of that note, on that day transferred to him, as collateral security, a policy of insurance for \$5,000 on the life of one Martin Robbins, who was then living, "and all his (said Duffee's) interest in the partnership assets belonging to the late firm of Dunklin, Duffee & Co.; and it was then and there agreed between said Duffee and this garnishee, that the proceeds of said policy of insurance and said partnership interest should be applied by this garnishee to payment of said note for \$1,458, and for the residue, after paying expenses of collection, &c., he was to account to said Duffee." The answer further stated, that said Robbins, whose life was insured, died on or about August 1st, 1879, and proof of his death, &c., had been prepared and forwarded to the insurance company; and that the garnishee had been notified, "on or about December 17th, 1878, that said Duffee had transferred whatever interest he had in said policy, after this affiant's said claims were satisfied, to W. B. Montgomery, who resides near Starkville, Mississippi, and who now claims said residue, if any there be, as his property." A supplemental answer was afterwards filed by the garnishee, alleging that he had collected the money due on the policy, and, after paying his own claims, necessary expenses, &c., had remaining in his hands a balance of \$2,267.38, which he brought into court; and he prayed that the plaintiffs in the garnishments and said W. B. Montgomery "be required to interplead, and to propound their respective claims to said fund, and that he be discharged."

The record does not show that Montgomery was ever notified of the garnishment proceedings; but, on the 4th March, 1880, a petition was filed in the causes by William Henderson, alleging that, on January 15th, 1880, he had purchased from Montgomery said Duffee's note, for which the policy of insurance, or Duffee's interest in the residue remaining after the satisfaction of Steiner's claims, had been assigned as collateral se-

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curity, and had taken from Montgomery "an assignment of all his right, title and interest in said collateral security;" and claiming and praying that the money in court should be paid over to him. At this stage of the proceedings the bills in these cases were filed, alleging that Duffee's debt to Montgomery was secured by mortgages on real and personal property, as well as by the assignment of the policy of insurance; and praying that Henderson, as the assignee of Montgomery and Duffee, be required to foreclose these mortgages, and be enjoined from further proceedings to claim the fund in court, until he had foreclosed the mortgages, and had accounted for the proceeds of sale of the mortgaged property.

The terms of the assignment by Duffee to Steiner, as expressed in the latter's receipt, which was made a part of his answer to the garnishment, were these: "Received, Mobile, August 27, 1877, of George G. Duffee, policy of life-insurance company, No. 39,871, issued by the Mutual Benefit Life Insurance Company of Newark, N. J., on the life of Martin Robbins, for the sum of \$5,000; also, an assignment and transfer of the entire interest of said Duffee in all the assets, real and personal, now belonging to the late firm of Dunklin, Duffee & Co., with full power of attorney to control, manage, and dispose of said assets. Said policy and said partnership interest are received by me as collateral security for the payment of a note for \$1,458, this day made by said Duffee, payable to my order, at the Mobile Savings Bank, twelve months after date. The proceeds of said policy, and said partnership interest, are to be applied by me to the payment of said note, and the residue, after paying necessary expenses of collection, &c., I am to account for to said Duffee."

Duffee acquired the policy of insurance by assignment, or transfer as collateral security, from one M. C. Robbins, who was indebted to him; and as further security for this indebtedness, said Robbins executed to him a mortgage on certain real estate in Mobile, and a chattel mortgage. These mortgages were transferred and assigned by Duffee, on the 30th December, 1877, together with the debt which they were given to secure, to said W. B. Montgomery, to whom he was indebted; and on the 13th January, 1878, as further security for said indebtedness, he also transferred to said Montgomery all his interest in the policy of insurance after payment of Steiner's claim. Duffee was also indebted to said William Henderson, by promissory note due December 1st, 1877; and as security for this debt, he assigned to said Henderson on the 15th August, 1879 (the day after the service of the garnishments on Steiner), whatever surplus might remain of the moneys realized on these collateral securities after the claims of Steiner and Montgomery

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were paid. On the 15th January, 1880, Henderson purchased from Montgomery the note held by him against Duffee, and took an assignment of all his interest in the policy and other collaterals transferred by Duffee; and in his petition to the Circuit Court, as well as in his answers to the bills, he claimed the fund in court by virtue of both of these assignments.

Separate answers were filed by the defendants, stating substantially the same facts; and each demurred to the bills, both for want of equity, and for the want of necessary parties. The chancellor refused to dismiss the bills, on motion, for want of equity, but required that M. C. Robbins should be brought in as a party. Robbins was then brought in by an amendment to the bill, and filed an answer submitting to the jurisdiction of the court, and offering to pay his indebtedness to Steiner as the court might direct. The chancellor then overruled the demurrers to the bill, and ordered an account to be stated by the register, 1st, as to the indebtedness of Robbins to Duffee; 2d, as to the indebtedness of Duffee to Henderson, on the claim transferred by Montgomery to Henderson; and, 3d, of the amount due to the complainants on their respective judgments against Duffee. The account stated by the register, under this reference, showed that Robbins owed Duffee, in excess of the fund paid into court by Steiner as garnishee, the sum of \$1,278.91; and that Duffee owed Montgomery, or Henderson as his assignee, on the claim assigned, the sum of \$2,129.08. The chancellor confirmed the register's report, after making some immaterial corrections, and rendered a decree, directing Robbins to pay into court the balance due to Duffee, and ordering the register to demand and bring into court the sum deposited by Steiner with the clerk of the Circuit Court; but he made no decree as to the distribution of the funds.

The appeal is sued out by Henderson, who here assigns as error the decree overruling his demurrer and motion to dismiss the bill for want of equity, and the decree confirming the register's report.

F. G. BROMBERG, for appellant.—The bills are without equity, because they attempt to supplement the statutory remedy by garnishment, by the equitable remedy of injunction.—*Phillips v. Ash*, 63 Ala. 414; *Drake on Attachment*, § 454. They show, also, that the legal title to the proceeds of the insurance policy was not in Duffee when the garnishment was served on Steiner, nor when he answered, but had passed by assignment to Montgomery more than twelve months before that time. That garnishment acts only on the legal rights of the defendant, see *Toomer v. Randolph*, 60 Ala. 356; *Henry v. Murphy*, 54 Ala. 246; *Godden v. Pierson*, 42 Ala. 370; *Jones v. Crews*, 64 Ala.

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368; Drake on Attachment, § 457. If Duffee had been the owner of the insurance policy, the assignment to Montgomery would have divested him of the right to sue Steiner for the proceeds, and would have conveyed that right to Montgomery. *Mardis v. Shackelford*, 6 Ala. 433; *Hamilton v. Kane*, 2 Hall, N. Y. 522; Code, § 2890. A policy of life insurance is a *chose* in action.—*St. John v. Insurance Company*, 13 N. Y. 39; *Palmer v. Merrill*, 6 Cush. (Mass.) 286. When a *chose* in action has been equitably assigned, it is not subject to attachment as the property of the assignor.—*United States v. Vaughn*, 3 Binney, 394. There being in Steiner's hands, when the garnishments were served on him, nothing for which Duffee could sue him at law, there was nothing on which the garnishments could operate, and the complainants acquired no lien on any fund. Drake on Attachment, § 454; *Wolffe v. Tappan*, 5 Dana, Ky. 136; *Treadwell v. Brown*, 43 N. H. 290. Montgomery was not served with garnishment; and on the 15th August, 1879, the complainants having neither judgment nor execution against Duffee, he might lawfully assign to Henderson, as he did, all his reversionary interest in the surplus which might remain of the fund after Montgomery's claim was satisfied.—*Flewellen v. Crane*, 58 Ala. 627; *Crawford v. Kirksey*, 55 Ala. 293.

OVERALL & BESTOR, *contra*.—The equity of the bill rests on the familiar principle, that when one creditor has a demand against two funds or estates, and another has a demand against one only of those funds or estates, the latter is entitled to throw the former on the separate fund not common to both.—1 Story's Equity, § 663, and notes; *Nelson v. Dunn*, 15 Ala. 501; *Gordon v. Bell*, 50 Ala. 220; *Bryant v. Stephens*, 58 Ala. 641. The complainants are judgment creditors of Duffee, and are seeking to condemn his interest in claims and securities transferred to him by his debtor, M. C. Robbins, who admits his liability, declares his willingness to pay as the court may direct, and submits himself to its jurisdiction. The fund is in court, all the parties in interest are before the court, and the only question is the distribution of the fund according to the principles which obtain in equity. The claim of Henderson, as the assignee of Montgomery, it is admitted, must be first paid; not out of the fund paid in by the garnishee, but first out of the debt due by Robbins, and the residue only out of the fund in court; and then the complainants' judgments, in the order in which their garnishments were served, which will exhaust the fund, before the individual claim of Henderson, founded on his assignment from Duffee, is reached.

SOMERVILLE, J.—The purpose of the present bill, on
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the part of the complainants, is to effect a *marshalling* of certain securities held by the appellant, Henderson, as the creditor of one Duffee, of whom also each of the complainants are judgment creditors. Duffee held a policy of insurance on the life of one Robbins, which he transferred as collateral security to Joseph Steiner, to secure a debt due him, in regard to the validity and priority of which there is no contest. He also owed Montgomery a debt of about two thousand dollars, and, to secure payment of this sum, he executed a mortgage to him on certain real property, also another mortgage on certain chattels, and he made, in addition to these securities, an assignment to Montgomery of his interest in the assets of the dissolved co-partnership of Dunklin, Duffee & Co., *as well as the residue in said life policy*, then in the hands of Steiner. This assignment was made *in January, 1878*. After these events, in November, 1879, each of the complainants, who are now appellees in this court, recovered judgment on their respective claims in the Circuit Court of Mobile county; and during the progress of these suits, served writs of garnishment on Joseph Steiner, summoning him to answer as the garnishee and debtor of Duffee. The garnishment process in favor of the Alabama Gold Life Insurance Company was served upon Steiner on the 12th of August, 1879, and that of Horton, the other complainant, on the day following. On the 15th day of August, after service of these garnishment writs, Duffee assigned to Henderson all of his interest in the surplus money arising from the insurance policy, subject to the claims of Steiner and Montgomery, which were prior in time and right. *Montgomery also assigned his claims on Duffee to Henderson, with all of his securities above described.*

The purpose of each of the bills under consideration—which were, on the hearing, *consolidated* into one cause by the chancellor—is to force Henderson, as the assignee of Montgomery, to exhaust his remedy against the mortgaged property, and the assets of Dunklin, Duffee & Co., before proceeding against the insurance money in the garnishee's hands. This is upon the principle, that where one creditor has a lien upon *two* funds or estates, and another creditor has a lien upon *one* of them only, the latter is entitled, in equity, to throw the former on the fund not common to both.—1 Story's Eq. Jur. § 663; *Gordon v. Bell*, 50 Ala. 220; *Nelson v. Dunn*, 15 Ala. 501.

Conceding that a garnishment or attachment lien, acquired by summoning a garnishee to answer at law, would entitle the plaintiff so acquiring it to such a remedy in a court of equity,—a point unnecessary to be decided—it becomes material to inquire whether, under the facts of this case, the complainants have any such lien on the fund here in controversy. If not,

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the whole case made by the bill is manifestly devoid of equity.

It has often been held, and may be considered as settled by our decisions, that attachment and garnishment proceedings sued out in courts of law, which are purely of statutory origin, can operate only on the *legal* rights of the defendant in attachment—at least, in cases where no fraud intervenes—or, in other words, upon such rights as the defendant could enforce, in his own name, by action at law. If money in the hands of a garnishee is sought to be reached, it must be of a character which the defendant in attachment could recover of the garnishee by action of debt, or *indebitatus assumpsit*.—*Henry v. Murphy & Co.*, 54 Ala. 246; 1 Brick. Dig. 175, §§ 313-14; *Jones v. Crews*, 64 Ala. 368; *Toomer v. Randolph*, 60 Ala. 356.

It is plain from the facts disclosed in the garnishee's answer, and the other pleadings in the Circuit Court, upon the propounding of Henderson's claim, which are also matters of proof in this cause, that the *legal title of the money* in Steiner's hands, admitted by him to be a balance of over twenty-two hundred dollars, had *passed out of him before the service of the garnishment writ* upon him. It was transferred to Montgomery, through the assignment made to him by Duffee in January, 1878,—considerably more than a year before the garnishment writ was issued. This fact is fatal to the garnishment proceeding; for no balance was in Steiner's hands, as the debtor of Duffee, upon which the lien could operate. Steiner owed Duffee nothing, but he owed Montgomery, as the assignee of Duffee, and Montgomery was not summoned as garnishee in the cause. The latter could have sued for the whole of the residue of the life policy fund, and if it was more than adequate to satisfy his claim, *he*, and not Steiner, would have been debtor to Duffee for the surplus, if any.

The remedy afforded by the statute is, therefore, clearly inadequate to reach this surplus by garnishment against Steiner, unless by successful contest of the garnishee's answer in the Circuit Court pursuant to the provisions of the Code authorizing such a controversy.—Code, §§ 3302-3. If Duffee had any interest in it, only his legal, and not his equitable rights, as we have shown, could be reached by garnishment. Nor in such cases is it permissible to resort to a court of equity, to supplement the defects of the statute.—*Phillips v. Ash's Heirs*, 63 Ala. 414; *Janney v. Buell and Wife*, 55 Ala. 408; *McClellan v. Lipscomb*, 56 Ala. 255. In this view of the case, the complainants had no lien on the fund in controversy, and the chancellor erred in granting the relief prayed; and his decree is hereby reversed, and the cause remanded.

[Whitehead & Son v. Lane & Bodley Company.]

Whitehead & Son v. Lane & Bodley Company.

Bill in Equity for Foreclosure of Mortgage; Cross-Bill to establish Equitable Set-off.

1. *Remedies of mortgagee, legal and equitable.*—A mortgagee may file a bill in equity to foreclose the mortgage, although he may also have an adequate remedy at law for the recovery of his debt.

2. *Description of premises in conveyance.*—When a conveyance of lands contains a particular description of the premises conveyed, by which they can be clearly identified, the insertion of other descriptive words, which are inapplicable, or incapable of definite application, will not be allowed to defeat it.

3. *Sale of machinery; admissibility of parol evidence to affect writing; burden of proof as to fraud or misrepresentation; defenses available to purchaser.*—On a sale of machinery by a manufacturer, the contract being reduced to writing, and the machinery delivered corresponding with the description therein contained, parol evidence is not admissible, in the absence of fraud or misrepresentation, to vary the terms of the writing; the burden of proving fraud or misrepresentation is on the purchaser; and not being established by the evidence, he can not resist the payment of the agreed price, when there was no warranty, because the machinery was found to be unsuitable for the particular purpose for which it was intended.

APPEAL from the Chancery Court of Butler.

Heard before the Hon. JOHN A. FOSTER.

The original bill in this case was filed on the 10th November, 1881, by the "Lane & Bodley Company," a private corporation chartered under the laws of Ohio, against James M. Whitehead and Augustus C. Whitehead individually, and as partners doing business under the firm name of Whitehead & Son; and sought to foreclose a mortgage on a house and lot in the town of Greenville, and on certain personal property therein particularly described. The mortgage, a copy of which was made an exhibit to the bill, was dated the 23d December, 1880, and was signed by said J. M. Whitehead and his wife, and by Whitehead & Son; and it purported to be given to secure the payment of two promissory notes, each for \$150, executed by said Whitehead & Son, of even date with the mortgage, and payable respectively on the 23d June, and 23d September, 1881, to "Lane & Bodley Company, or order," at the banking-house of J. R. Adams & Co. in the city of Montgomery, with interest from date. The notes were given in payment of the balance due for the agreed price of certain mill machinery and

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fixtures sold by the complainant to said Whitehead & Son; and each note, copies of which were made exhibits to the bill, contained a stipulation in these words: "It is, furthermore, the express condition of the delivery of the said saw-mill and machinery, &c., to us, that the title, ownership and possession does not pass from the said Lane & Bodley Company, until this note is paid in full, with interest; and said Lane & Bodley Company may take possession of said saw-mill, machinery, &c., and sell the same for our account, at any time, in case this note is not promptly paid; in which case, we hold ourselves liable for any and all loss or damage caused by our failure to meet this note." The property conveyed by the mortgage was therein described as follows: "A house and lot in the city of Greenville, Alabama, containing one acre, more or less, fronting seventy feet on Conecuh street, being lot number one (1) in square number four (4) in said city, lying between Conecuh and Chestnut streets, and known as the DeWitt Dillard place; also, the saw, saw-frame, log-carriage and fixtures, purchased by us from said Lane & Bodley Company, for the saw-mill of J. M. Whitehead & Son in Butler county." The prayer of the bill was, that an account might be taken to ascertain the amount due on the notes secured by the mortgage, and that the property conveyed by it, real and personal, might be sold in satisfaction of the debt, if not sooner paid by the defendants.

The defendants filed a joint demurrer to the bill, assigning as causes of demurrer, 1st, that the bill contained no equity; 2d, that the complainant had a complete and adequate remedy at law; 3d, that the notes showed an executory contract for the sale of the machinery, the title remaining in the complainant until the notes were paid, and that the complainant could not hold the property, and at the same time recover the agreed price. The chancellor overruled the demurrer, and the defendants then filed an answer, in which they stated, in substance, that their contract for the purchase of the machinery was made, in Montgomery, with C. J. Dudley & Co., as agents of the complainant, who was engaged in Ohio in the manufacture of machinery for mills; that they were not skilled in the business, and had no practical knowledge of the machinery and fixtures required, and trusted to the representations of said C. J. Dudley & Co. as to these matters; that they desired to erect a saw-mill and purchase the machinery necessary for squaring large timber for the Pensacola market, and so stated to said C. J. Dudley & Co., who represented that the machinery purchased was suitable for that purpose; that the mill and machinery, when delivered and put into operation, proved to be entirely too light for the purpose intended, and incapable of squaring large timber; and that they had sustained great loss and

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damage on account of this deficiency. J. M. Whitehead further answered, that the lot which the mortgage purported to convey, described as being situated in square number four, never belonged to him, and was inserted in the mortgage by mistake; and that the lot which he intended to convey, situated in square number seven, had since been sold and conveyed to another person, who had no notice of the mortgage. They asked that their answer might be taken and considered as a cross-bill; that an account might be taken of the damages which they had sustained by the incapacity and unsuitableness of the mill and machinery, and the same be allowed as an equitable set-off against the complainant's demand, and that the notes and mortgage might be delivered up and cancelled. C. J. Dudley & Co. were also made defendants to the cross-bill, and it was prayed that they be required to deliver up, for cancellation, certain notes which Whitehead & Son claimed to have left with them when the contract was entered into, and for which the other notes were executed as substitutes; but these matters require no special notice.

C. J. Dudley, whose deposition was taken by the complainant, denied any misrepresentations on his part, as to the capacity or quality of the machinery sold; and appended to his answers, as an exhibit, the written contract signed by said Whitehead & Son, with the accompanying guaranty signed by C. J. Dudley & Co. The contract was in these words: "*Order or agreement to purchase.* Montgomery, Dec. 30, '80. This is to certify, that we have this day agreed to purchase of C. J. Dudley & Co. one Lane & Bodley Company solid iron frame saw-mill, known as their 'Siding Mill,' with independent screw head blocks, with common dogs, forty (40) feet of carriage, sixty (60) feet of twelve-inch three-ply rubber belt, and one solid-tooth circular saw, fifty-two (52) inch; to be shipped from Cincinnati, Ohio, by or about January 14th, 1881; which we agree to receive upon arrival at Greenville, and pay freight and charges thereon. And we also agree to remove said saw-mill from the station, to a suitable storage, and otherwise take good and proper care of the same, and to notify said C. J. Dudley & Co. as soon as possible; and they may put the said saw-mill in working order at our expense, and furnish the necessary instructions for running the same. We further agree to settle for said saw-mill, [if it?] in fact proves equal to the guaranty hereon printed, on the following terms;" specifying the cash payment, the notes and mortgage, and adding: "It is expressly understood, by this agreement to purchase the above named machinery we do not acquire any right, title or interest in the same, until after the specified terms of payment are fully completed; and the said C. J. Dudley & Co., or their authorized

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agents, have the right to take possession of said machinery at once, upon refusal or neglect to comply with said terms of payment." The accompanying guaranty was in these words: "The above machinery to be warranted of good materials and workmanship; to do work well, if properly used; and to do as good and as much work, under the same conditions, as any machinery of its class in the United States. Should any defect be discovered, in workmanship, materials, or efficiency of the said machinery, notice must be given to us within one month from the time the machinery is put into use, that the cause may be removed; else we shall not be held responsible."

The chancellor sustained a demurrer to the cross-bill, and dismissed it; and on final hearing on pleadings and proof, held the complainant entitled to relief, and ordered an account of the mortgage debt to be stated by the register. The appeal is sued out by the defendants below, and they here assign as error the overruling of their demurrers to the bill, the dismissal of their cross-bill, and the final decree.

CLOXTON, HERBERT & CHAMBERS, for appellant.

BUELL & LANE, *contra*.

BRICKELL, C. J.—1. It may be that, under the contract of sale, the title to the mill and machinery vested in the purchasers, only upon the condition that the purchase-money was paid; and that, upon default in payment, the sellers could have reclaimed it. But the sellers had also the security of the mortgage, and it was their right to pursue that security, rather than resort to a reclamation of the things sold. It is the common case of a mortgagee, having a legal remedy for the recovery of the mortgage debt, preferring the equitable remedy to foreclose the mortgage.

2. There is an error in the mortgage, in describing the mortgaged premises as situate in square number *four* in the city of Greenville, while their real location is in square number *seven*. What would be the effect of the misdescription, if there was not a further designation and description of the premises, by which they may be precisely identified, it is not important to consider. There is the further description, that they are situate between Conecuh and Chestnut streets, fronting seventy feet on Conecuh street, and are known as the "DeWitt Dillard place," which is inapplicable to any part of square number four. The rule is of general application, that if from any part of the description the premises intended to be conveyed clearly appear, the conveyance will not be defeated, because other circumstances of description are added, which are inapplicable,

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or not capable of definite application.—*Clements v. Pearce*, 63 Ala. 284.

3. The principal point of contention is, whether the mill and machinery were sold to the appellants as fitted for the particular purpose, the squaring of large timber, for which they intended it; or whether the sale was of things described and defined, the appellants relying upon their own judgment as to their fitness for the purpose for which they designed them. There is conflict in the evidence upon the point. The burden of proof rests upon the appellants, and we are not prepared to say it is shown, by a preponderance of the evidence, that there was a contract, or warranty, or representation, by the agent of the sellers, that the mill and machinery were fitted for any particular purpose. The contract is in writing; the things sold are described, and the things delivered correspond to the description. In the absence of fraud, or misrepresentation, there is no room for parol evidence which would vary the contract. The most that can be justly said, however, in view of all the evidence, is, that the appellants have the misfortune of having purchased the mill and machinery upon the supposition that it would answer the purpose for which they designed it, and find upon trial that it is unsuitable. The misfortune is of frequent occurrence; and when there is no fraud, no breach of contract, or of warranty, on the part of the seller, the purchaser must bear it. If the cross-bill had been entertained, relief upon it could not have been granted; and from its dismissal the appellants have sustained no injury.

Affirmed.

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Bill in Equity by Creditor, to set aside Conveyances as Fraudulent and Voluntary.

1. *Equitable relief against probate decree, on ground of errors or mistakes.*—A defendant in a probate decree, rendered on final settlement of his accounts as executor, administrator, or guardian, seeking equitable relief against it on account of alleged errors of law or fact (Code, §§ 3837-39), must show that the errors complained of occurred without fault or negligence on his part.

2. *Homestead exemption; occupancy.*—A claim of homestead exemption can not prevail, without averment and proof of occupancy.

3. *Conveyance to creditors; when fraudulent as to others.*—A conveyance or sale by an insolvent debtor to one of his creditors, in payment of an existing debt, will not be held fraudulent as against other creditors,

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because of an actual fraudulent intent on his part, unless the creditor had knowledge of that intent, or participated in the fraud.

4. *Use of wife's funds by husband; whether conversion or investment.* When the husband purchases property at an administrator's sale, and is allowed a credit on his purchase to the extent of his wife's distributive share of the estate, this is not an investment for the wife, but a conversion of her interest, and renders him her debtor for the amount.

5. *Same; as consideration of conveyance to wife.*—If the husband receives moneys belonging to his wife's statutory estate, and converts them to his own use, thereby becoming a debtor to her to that amount, this constitutes a valuable consideration to support a subsequent conveyance to her; but he is not liable for interest on such moneys, nor for property belonging to her which he received, but which he is not shown to have sold and converted to his own use; and as to these items, the conveyance would be without a valuable consideration.

6. *Fraudulent conveyance; when allowed to stand as valid security.* When a conveyance is assailed by creditors on the ground of fraud, and the grantee is not implicated in the fraudulent intent of the grantor, the conveyance will be allowed to stand as a valid security to the extent of the actual consideration proved to have been paid.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. N. S. GRAHAM.

The original bill in this case was filed on the 5th February, 1881, by Peter W. Lyne, as the administrator of the estate of his deceased wife, Mrs. Sarah F. Lyne, against Isaac D. Wann and his wife, Mrs. Lucinda E. Wann; and sought to set aside on the ground of fraud, actual and constructive, several conveyances of property to Mrs. Wann, and to subject the property to the payment and satisfaction of a debt due and owing by said Isaac D. Wann to the estate of the complainant's intestate. Mrs. Lyne, the complainant's deceased wife, was a daughter of one Robert Owen, who died in her infancy; and on the 20th November, 1860, letters of guardianship of her and her estate were duly granted, by the Probate Court of Madison, to said Isaac D. Wann. On the same day, the sum of \$1,037.08 was paid to said guardian, by the administrator of Owen's estate, as the ward's distributive share of the estate. On the 24th December, 1872, the complainant and his wife were married; and on her death, intestate, in February, 1875, letters of administration on her estate were granted to him. On final settlement of Wann's accounts as guardian, on September 30th, 1880, a decree was rendered against him, in favor of the complainant as administrator, for \$2,961.13; and execution having been issued on this decree, against said guardian and the sureties on his bond, and returned "No property found," this bill was filed to subject the property standing in Mrs. Wann's name, particularly described in the bill, to the satisfaction of the decree, on the ground that the conveyances to her were without consideration moving from her, and that the title was conveyed to her, by and at the instance of her husband, for the purpose of hin-

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dering, delaying, and defrauding his creditors, and particularly the complainant, in the collection of their debts. There were two conveyances to Mrs. Wann; the first dated October 6th, 1866, by which said Isaac D. Wann conveyed to her certain lands and lots in the town of Vienna, on the recited consideration of \$300 in hand paid; and the second dated September 6th, 1866, by which the sheriff conveyed to her, as the purchaser at a sale under execution against John C. Drake, a tract of land containing 720 acres, at the price of \$296. This execution was issued on a judgment against said Drake, in favor of Isaac D. Wann; and the bill alleged that said Isaac D. was himself the purchaser at the sale, and paid the price bid by entering it as a credit on the judgment. This tract of land was sold in March, 1869, for unpaid taxes assessed against it, and a deed was afterwards executed to Mrs. Wann, as the purchaser; and the bill sought to set aside this deed also, on the same allegations of fraud.

Separate answers were filed by the defendants, which were, however, substantially the same. They denied the charges of fraud, and asserted the validity of the several conveyances to Mrs. Wann; the consideration moving from her husband to her being, as alleged, his indebtedness to her for moneys which he had received during their coverture, belonging to her statutory estate, which he had used and converted to his own use; these moneys being \$1,037.08, "received from the estate of her father in 1860," and \$828.02, "received from the estate of her grandfather, Thomas Blackwell, in April, 1860." Wann also filed a cross-bill, in which he denied the validity of his appointment as guardian of said Sarah F. Lyne (or Owen), and assailed the correctness of the decree against him, specifying items in the account which ought not to have been charged against him.

On final hearing, on pleadings and proof, the chancellor dismissed the bill, but held it unnecessary to pass on the questions raised by the cross-bill, which he also dismissed; and his decree dismissing the bill is now assigned as error.

D. D. SHELBY, for the appellant, cited *Otis v. Dargan*, 53 Ala. 178; *Pickett v. Pipkin*, 64 Ala. 520; *Hubbard v. Allen*, 59 Ala. 283; *Humes v. Scruggs*, 4 Otto, 22; *Ticknor v. Wiswall*, 9 Ala. 309.

JNO. D. BRANDON, *contra*, cited *Northington v. Faber*, 52 Ala. 45; *Davidson v. Lanier*, 51 Ala. 318; *Young v. Dumas*, 39 Ala. 60; *Tompkins v. Nichols*, 53 Ala. 197; *Marshall v. Croom*, 59 Ala. 121; *Sterry v. Arden*, 1 John. Ch. 261; *Verplanck v. Sterry*, 12 Johns. 336.

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STONE, J.—The prayer of the cross-bill asks relief in the alternative. In its primary aspect, it is contended it makes a case within the provisions of section 3837 of the Code of 1876; the section which provides for the correction of errors of law or of fact, committed in the settlement of estates in the Probate Court. This claim, considered either in the form in which it is presented in the original answer, made a cross-bill, or in the amended cross-bill, is fatally defective as a basis of relief. It fails to show the errors and injury complained of were without the fault or neglect of Mr. Wann, according to the construction this court has uniformly placed on those words.—*Bowden v. Perdue*, 59 Ala. 409; *Pickett v. Pipkin*, 64 Ala. 520; *Beadle v. Graham*, 66 Ala. 102; *Collier v. Falk*, *Ib.* 223; *Broda v. Greenwald*, *Ib.* 538. Nor is the cross-bill any more successful in the claim of homestead. It contains no averment, that the premises in which homestead is claimed, were, or ever had been occupied by Mr. Wann. This is a fatal omission.—*Blum v. Carter*, 63 Ala. 235. In the present controversy, we must treat the probate decree as rightly ascertaining Wann's liability, and the extent of it.—*Pickett v. Pipkin*, 64 Ala. 520.

The present bill is by a creditor—judgment creditor—of Mr. Wann, to subject certain described lands to the payment of said claim, on the alleged ground that they were and are the property of said Wann, and had been fraudulently, and without consideration, conveyed to his wife, for the purpose of delaying and hindering his creditors generally, and the complainant specially, in the collection of their said claims. The conveyances to the wife were made long after the debt was incurred, to the payment of which the lands are sought to be subjected. The defense is, that Mr. and Mrs. Wann intermarried since 1850, and that after the marriage there accrued to her, from the estates of her father and grandfather, moneys, her statutory separate estate, which were received by her husband and trustee; and being used and converted by him, the lands in controversy were conveyed and procured to be conveyed to the wife, in payment of such indebtedness. There were two separate conveyances; first, the lots in the village of Vienna; and second, the lands near by, known as the "Drake place."

We do not understand it to be disputed that the marriage took place after 1850, and that, subsequent to that time, there did accrue to Mrs. Wann moneys, both from the estate of her father, Owen, and of her grandfather, Blackwell. In the absence of countervailing proof, and there is none such in this record, such money, so received, became at once the statutory separate estate of Mrs. Wann, of which her husband was the trustee, with the right to receive and receipt for it. There is no conflict in the testimony, as to the amount derived from the estate

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of Robert Owen, the father. The whole amount, including the five hundred dollars received as advancement during Mr. Owen's lifetime, was one thousand and thirty-nine 8-100 dollars. As to the sum received from the grandfather, Mr. Blackwell's estate, there is controversy. The authenticated transcript of a settlement of the Blackwell estate, had in a County Court of Tennessee, and the testimony of the administrator, tend to show the sum received from that source was four hundred and sixty-nine 53-100 dollars. Several witnesses for the appellee fix the sum at eight hundred and twenty-eight 2-100 dollars. The testimony bearing on this question is not clearly satisfactory. We incline to the conclusion, that the latter is the true sum, and that it probably had been augmented by a sale of the lands belonging to the estate. We, however, leave this question open, as it may be made clearer when the reference comes to be executed. If the larger sum be the true one, then the aggregate of the two distributive interests will be eighteen hundred and sixty-seven 10-100 dollars.

It is contended for appellant, that, irrespective of the question of indebtedness of Wann to his wife on the accounts mentioned above, these conveyances must fall, by reason of actual fraud committed in their execution. In *Crawford v. Kirksey*, 55 Ala. 232, we laid down the rules for determining when a sale of property by an insolvent debtor to his creditor, in payment of a debt, will be adjudged fraudulent. Tested by these rules, we do not think either of these conveyances is infected with actual fraud, if the alleged indebtedness existed. If Wann's purpose was to delay and hinder his creditors, there is no testimony that his wife knew of it, or that she received larger payment than she believed to be due to her. On the hypothesis that Wann owed his wife on the accounts alleged, the charge of actual fraud is not made good.—*Young v. Dumas*, 39 Ala. 60.

It is contended for appellant, that Wann invested his wife's distributive share of her father's estate in the purchase of a slave and a mule; that this was an investment by him which the law authorized, and that therefore he did not owe her on that account. This, of course, refers to the residuum of five hundred and thirty-nine 8-100 dollars, allowed in final settlement, after debiting Mrs. Wann with the five hundred dollars advanced by her father during his lifetime. The slave and mule were purchased by Wann at the sale of the property by the administrator. There is no testimony that he purchased for, or in the name of his wife. This sale must have preceded the settlement and distribution. There is no testimony that the five hundred and thirty-nine 8-100 dollars coming to Mrs. Wann in distribution, covered and paid the purchase price of the slave and mule. The tendency of the testimony is that it did not, and

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that in the final settlement Wann was allowed a credit on his purchase, to the extent of his wife's distributive interest, and in that way received it. This was not an investment for the wife, but a conversion by the husband.—*Smith v. Whitfield*, 71 Ala. 106. To this extent, it is clear that Wann was debtor to his wife.

The alleged advancement of five hundred dollars, made by Mr. Owen in his lifetime, is in a somewhat different category. The testimony is not very clear as to what that consisted of. If it was money, and Wann used and converted it, then it constituted a debt from him to her. If it was property, either in whole or in part, and if there is no proof that that property was sold and the proceeds used and converted by Wann, then it would not constitute a debt from him to his wife. This is a subject for inquiry and report by the register.

The principal sum of his wife's money, received and converted by Wann, will constitute the amount of his indebtedness to her. He was not liable for interest, and consequently interest on the sum furnishes no valuable consideration for either of the conveyances.—*Early & Lane v. Owens*, 68 Ala. 171; *Daffron v. Crump*, 69 Ala. 77. We may as well state here as elsewhere, that Mrs. Wann's title derives no strength whatever from the tax sale and purchase thereunder.—*Johnson & Seatz v. Taylor*, 70 Ala. 108.

Applying the foregoing principles, there can be no question, in any statement of the account, that Wann was indebted to his wife in a sum greater than three hundred dollars. The conveyance of the Vienna lots, and the little field mentioned in Wann's deed, purport to be in payment of three hundred dollars of the latter's indebtedness to his wife. The testimony fails to convince us clearly that the lands therein conveyed were, in the condition they were in when the conveyance was made, worth more than the recited consideration—three hundred dollars. That conveyance must stand, and was an extinguishment, *pro tanto*, of Wann's debt to his wife.—*Goodlett v. Hansell*, 66 Ala. 151.

The conveyance of the Drake land rests on different principles. In making up the account of the trust fund which had passed through his hands—statutory separate estate of his wife—Wann debited himself with interest on the fund which he testifies he received and converted. In this way the sum of the indebtedness was footed up, which is made the consideration—the sole consideration—upon which the title of the Drake lands was vested in Mrs. Wann. We say sole consideration; for, in the several payments which were afterwards made in the settlement or compromise with Drake, the moneys of Mr. Wann were used. His wife had no money. She owned only her

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claim against her husband, and the real estate he had conveyed to her. If her lots had yielded rents, Wann was not liable to account for them. Then, to the extent Wann was in default to his wife for the principal of her statutory estate converted by him, after obtaining credit for the three hundred dollars paid in the Vienna lots, the Drake transaction rested on a valuable consideration. All beyond this was voluntary, and constructively fraudulent, as against creditors. But Mrs. Wann, not being complicated in any actual fraud, holds the Drake lands, as a security for the sum actually due her.—*Gordon, Rankin & Co. v. Tweedy*, 71 Ala. 202. As to these lands, the complainant is entitled to relief, and the decree of the chancellor must be reversed.

Proceeding to render the decree the chancellor should have rendered, it is ordered and decreed that the complainant is entitled to relief, as to the lands known as the Drake place. It is referred to the register to take and state the account, showing the amount of money, distributive interest of his wife in the estates of her father and grandfather, Wann received and converted, or used in and about his own affairs. Property received and used in the family, is not to be charged in this account. For the sum of the principal thus received and converted by him, less three hundred dollars paid in the Vienna lots, Mrs. Wann is entitled to be first paid out of the proceeds of the Drake lands; and the residue will be paid to the complainant in this suit, to the extent ascertained by the decree of the Probate Court. The register will report to the Chancery Court with all convenient speed. All other questions are reserved for decree by the chancellor.

Reversed and remanded.

This decree to take effect as of June 6th, 1882, when this cause was submitted.

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Bill in Equity by Purchaser, for Specific Performance.

1. *Statutes omitted from Code.*—The act approved March 4th, 1876, entitled "An act to allow married women in certain cases to sue in their own names" (Sess. Acts 1875-6, p. 159), having been omitted from the Code of 1876, is not now operative as a statute.

2. *Statutory provisions as to parties, in suits by married women.*—The statute which provides that a married woman "must sue or be sued

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alone, when the suit relates to her separate estate" (Code, § 2892), applies only to actions at law, and has no reference to suits in equity.

3. *Rules of practice as to parties, in suits by married women.*—The 15th Rule of Chancery Practice, adopted in January, 1877, providing that "all bills and petitions by married women, in reference to their separate estates, shall be exhibited in their own names, if over twenty-one years of age, or relieved of the disabilities of coverture" (Code, p. 163), was intended to carry out the legislative policy indicated by the said act approved March 4th, 1876, since inoperative because omitted from the Code of 1876; and while said rule applies equally to all separate estates, whether statutory or equitable, it extends only to cases in which, prior to its adoption, it was necessary that a married woman should sue by her next friend, and does not apply to cases in which it was necessary or proper that she and her husband should join as co-complainants.

4. *Joinder of husband and wife as plaintiffs.*—As decided in this case on a former appeal (66 Ala. 292), the wife is a proper and necessary party to a bill filed by the husband, seeking the specific performance of a contract for the sale of a tract of land, when it appeared that the purchase-money was paid with funds belonging to the wife's statutory estate, though the title-bond was taken in the name of the husband; and if the evidence establishes the case made by the bill, the title should be vested in the wife by the decree of the court for a specific performance.

5. *Possession as evidence of title, and protection to possessor against subsequent incumbrance.*—The open, notorious, and exclusive possession of land by a purchaser, claiming it as his own, whether in trust or otherwise, is constructive notice to all the world of his title, whether it be legal or equitable; and he is entitled to protection against a mortgage subsequently executed by his vendor, and against any one claiming under such mortgage.

6. *Subrogation of sureties on note for purchase-money, to vendor's lien on land, as against sub-purchaser who has made payment.*—If the sureties on a note given for the purchase-money of land, having paid the balance due on the note, can claim to be subrogated to the vendor's equitable lien on the land, they can not assert that right against a sub-purchaser of a portion of the tract, when the purchase-money paid by the latter has been applied in partial payment of the note on which the sureties were bound.

APPEAL from the Chancery Court of Blount.

Heard before the Hon. THOMAS COBBS.

This case was before this court during the December term, 1880, on appeal by the defendants, Thomas Sawyers and others; and the decree of the chancellor was then reversed, and the cause remanded, because Mrs. Rebecca Baker, the wife of the complainant, was not joined with her husband, Henry Baker, as a complainant in the bill. The original bill was filed on the 5th July, 1879, and sought the specific performance of a contract for the sale of a tract of land, which said Henry Baker had bought from Columbus S. Boone, one of the defendants to the bill, a divestiture of the legal title out of the other defendants claiming under said Boone, and the recovery of the possession. The record on the former appeal showed that the original bill was filed in the name of Henry Baker alone, and the decree of the chancellor was reversed, on the demurrer interposed, because Mrs. Baker was not joined with her husband

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as a complainant in the bill. As set out in the transcript in this case, the original bill was filed in the names of said Henry Baker and his wife jointly; and an amended bill was also filed in their joint names, under an order of the court allowing it, on the 15th September, 1881.

According to the allegations of the bill, original and amended, the tract of land involved in the suit had belonged to one Josiah McCollum, deceased, who was the grandfather of Mrs. Rebecca Baker, and she was one of the distributees of his estate. Said McCollum died in 1871, and letters of administration on his estate were duly granted, on the 18th October, 1871, to said Columbus S. Boone, one of the defendants in this suit. Under an order of the Probate Court, granted on his petition, said administrator sold the lands of the estate, and became himself the purchaser at the price of \$1,112.40; "and in some manner unknown to complainants," as the bill alleged, "he executed his promissory note for said sum to the heirs of said estate, or to some of them, with said Thomas Sawyers and John Gamble as his sureties." The sale was reported to the court, and was duly confirmed on the 16th October, 1872. The said Boone took possession of the land under his purchase, and continued in the possession until some time in October, 1875, when he sold a part of the tract, particularly described in the bill, to Henry Baker, the complainant in the original bill; and, according to the allegations of the amended bill, he placed said Baker and wife in possession, under their purchase, in November, 1875. The purchase-money agreed to be paid by Baker, \$550, was, according to the allegations of the bill, settled in this way: "At the time your orator purchased said land, and during the time said trade was being consummated, it was agreed by and between your orator and said Boone, that orator should see said H. A. Gillespie" (the administrator *de bonis non* of McCollum's estate, who had possession of Boone's note for the original purchase-money), "and receipt him for said sum of \$550, as the husband and trustee of his said wife, Rebecca Baker, and have said sum of \$550 placed as a credit on said Boone's note, or in some way cause said sum to be credited on said note; and in pursuance of said agreement, your orator did receipt said administrator *de bonis non* for said sum of money, as a part of said Rebecca's share of the estate of her said grandfather, and caused said note to be credited with said sum; and in this way and manner your orator and oratrix made full payment to said Boone for said land so purchased of him, all of which was done by and with the consent and approval of your oratrix, Rebecca Baker."

On the 16th January, 1876, as the allegations of the bill further showed, Boone executed a mortgage on all the lands he

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had purchased at his own sale, including the portion which he had sold to Baker as above stated, to said Sawyers and Gamble, to indemnify them against liability as his sureties on the note for the purchase-money; but Baker and his wife were then in possession of the part which they had so purchased. On the 3d January, 1877, a judgment was recovered in the Circuit Court by said H. A. Gillespie, as administrator *de bonis non*, against said Boone, Sawyers and Gamble, for \$889.12, being the balance due on Boone's note for the purchase-money, with interest, after deducting the \$550 paid or settled by Baker. On the 16th January, 1877, pursuant to an order of the Probate Court, the administrator *de bonis non* executed to Boone a conveyance of the lands bought by him at his sale. After the rendition of said judgment in the Circuit Court, "and in the early part of the year 1877," Sawyers, one of the mortgagees, sold and conveyed the lands to Daniel Sandlin, who was also made a defendant to the bill; and said Sandlin having recovered the possession from the complainants, "by some sort of proceeding instituted in a justice's court in said county," the complainants were dispossessed under that judgment. The complainants claimed and alleged that, at the time Boone executed the said mortgage to Sawyers and Baker, there was no liability resting on them as his sureties; and that being in possession of the land which said Baker had bought, at the time the mortgage was executed, and having paid the purchase-money, they had acquired a perfect equity, and were entitled to protection against any claim or title asserted by the defendants.

A demurrer to the amended bill was filed by Sawyers and Sandlin jointly, on the following (with other) grounds: 1st, that there was a misjoinder of complainants, because Baker had no interest in the suit, and his wife should have sued alone; 2d, "that said Sawyers and Gamble, as sureties on the note of said Boone given for the purchase-money, had the right, upon the rendition of judgment against them thereon, and the payment thereof by them, to assert and enforce a vendor's lien on said land for the amount so paid, with interest and costs, and the purchase of said lands by complainants was made (if at all) with full knowledge of all the facts, and of such right in said sureties, or either of them." The chancellor overruled the demurrer, and his decree thereon is now assigned as error.

GEO. H. PARKER, and HAMILL & DICKINSON, for appellant, cited the 15th Rule of Chancery Practice (Code, p. 163); *Baines v. Barnes*, 64 Ala. 375; *Knight v. Blanton's Heirs*, 51 Ala. 333; *Knighton v. Curry*, 62 Ala. 404; 1 Story's Equity, § 499a.

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JOHN W. INZER, *contra*.

SOMERVILLE, J.—The 15th Rule of Chancery Practice (Code, 1876, p. 163) provides, that “all bills and petitions filed by married women *in reference to their separate estate*, if over twenty-one years of age, or relieved of the disabilities of coverture, shall be exhibited *in their own names*; in all other cases, *by next friend*.” This rule was adopted by this court in January, 1877, and was designed to carry out the legislative policy, as indicated by the act of March 4, 1876, entitled “An act to allow married women, in certain cases, to sue in their own names.” It was there enacted, that married women, over twenty-one years of age, might sue in their own names, in all cases in which they were previously “required to sue by or in the name of a *next friend*.” Though the act itself seems to have been omitted by oversight from the present Code, and, therefore, has no binding force, it serves to illustrate the design of the rule suggested by it. Its purpose, very clearly, was to abolish the former rule, which required married women to sue by their next friend, in all cases, in courts of chancery, where the suit related to their separate property. It is too obvious for argument that it has no reference to the question of the wife’s joinder, or non-joinder with her husband, as co-complainant, but leaves this to be settled by the established rules of equity pleadings.—1 Dan. Ch. Pr. 109*. And we apprehend that no doubt can exist, that it is applicable alike to separate estates of both kinds, statutory and equitable.

The case, in our opinion, presents no improper joinder of parties plaintiff. The suit, as originally instituted, was brought in the name of the appellee, Henry Baker, to whom Boone had conveyed the land in controversy. The husband, however, having purchased the land with the wife’s property (being a part of her statutory separate estate), and having taken the conveyance from Boone in his own name, was a mere *trustee* for her; and it was ruled by this court, when this case was here before on appeal, that the wife, as *cestui què trust*, was a necessary party to the suit.—*Sawyers v. Baker*, 66 Ala. 292. We then said: “If she freely assented to the purposes of the bill, she was a proper party complainant; otherwise, she should have been made a defendant.”—*Id.* 295. The bill was afterwards amended, so as to make her a co-complainant with her husband; and it is now insisted that this is a misjoinder of parties.

The question is unaffected by the statute; section 2892 of the Code (1876), requiring the wife to sue alone when the suit relates to her separate estate, plainly having reference to suits at law alone, and being inapplicable to suits in equity. The doctrine as to parties is essentially different in courts of law,

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and in courts of equity; and it is often a matter of no grave concern, in some cases, whether a given party is complainant or defendant.—Story's Eq. Plead., § 76. Where, however, the husband has no adverse interest to his wife, and neither seeks any relief against the other, both being necessary parties to a suit instituted to enforce some legal right of the wife in a court of equity, the rule is, that they may unite as co-complainants.—1 Dan. Ch. Prac. 109;* *Bein v. Heath*, 6 How. (U. S.) 228; Story's Eq. Plead., § 61-62; *Booth v. Albertson*, 2 Barb. Ch. 313.

In *Pitts v. Powledge*, a bill was filed by the husband alone, to enforce a vendor's lien for the unpaid purchase-money, evidenced by a promissory note made payable to him. The wife was allowed to be made a co-complainant, by amended bill, alleging that the land belonged to her statutory separate estate. That case and the present are essentially the same in principle, and we can see no error in the action of the chancellor allowing the amendment, to which objection is taken by demurrer.

We make yet another suggestion, corroborative of the correctness of the foregoing views. The husband here holds a deed to property, as a mere *trustee* for the wife. She is the beneficiary, or real owner in equity, and seeks relief, to which the husband consents. It is the duty of the court to protect the trust, by decreeing that the title be made to *her*, if to any one. In this view, she is certainly a proper, if not a necessary party plaintiff with the husband.

It is further insisted by the appellants, that their equity in the lands purchased by Baker is superior to Mrs. Baker's. In *Sawyers v. Baker* (66 Ala. 292, 296), *supra*, we held that, although Baker was the purchaser of a mere equitable title from Boone, still his *possession* of the land was a fact which charged all subsequent purchasers with notice, and was equivalent to registration of his deed, which was unrecorded. And he having paid the purchase-money, before the mortgage on the same land was executed by Boone to Sawyers and Gamble, his equity was held to be superior to that acquired by them through their mortgage. This conclusion was based on the principle, now well settled in this State, that the open, notorious and exclusive possession of real estate, by a vendee holding under an unrecorded deed, and claiming the land as his own, whether in trust or otherwise, is constructive notice of the vendee's title, whether legal or equitable in its nature.—*McCarthy v. Nicrosi*, at present term. We are satisfied with the conclusion then reached, without adding more.—*Hendricks v. Kelly*, 64 Ala. 388; *Wade on Notice*, § 273; *Ludlow v. Gill*, 1 Amer. Dec. 294, note; *Burt v. Cassety*, 12 Ala. 734.

But it is contended, that as Sawyers and Gamble, the appel-
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lants, were sureties of Boone on the note given for the purchase-money, which was a lien on this land in favor of the vendor, and as they paid the balance due on this note, they are entitled to be subrogated to the vendor's lien, which is superior to the equity of the appellees. The authority of *Knigh-ton v. Curry*, 62 Ala. 404, is cited in support of this view. Conceding that this case limits, if it does not modify, the old doctrine declared on this subject in *Foster v. Trustees of Athe-neum* (3 Ala. 302), and that a surety can, in such cases, work out the equity of subrogation, there is one important feature in the case at bar, which would utterly defeat its assertion as against the appellees. The sureties were certainly liable for the whole of the purchase-money, due on the land purchased by their principal, Boone. This amounted to more than eleven hundred dollars, and was evidenced by the joint and several note of Boone and these sureties, Sawyers and Gamble. When Baker purchased the land in controversy, which was something less than half of the original tract, he paid for it the sum of five hundred and fifty dollars, which *was credited on this note*. The sureties have, therefore, gotten the full benefit of this credit once, and can not, in equity or good conscience, be permitted to enjoy it a *second time*, to the detriment of the purchaser. It does not appear that the price paid was inadequate, or the purchase unfair. If this claim is sustained, the sureties will virtually have been permitted to enforce their alleged equity *twice against the same land*—once by having the purchase-money paid by Mrs. Baker appropriated to pay about half of their own debt, and again by enforcing a lien against it for the other half. No principle of equity jurisprudence is known to us, by which such an inequitable proceeding can be justified, or tolerated.

The chancellor was clearly correct in overruling the demurrer filed to the bill by the appellants, and his decree is affirmed.

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Bill in Equity by Judgment Creditor, to set aside Voluntary Conveyance as Fraudulent.

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124	806
72	55
139	299

1. *Burden of proof as to consideration of conveyance assailed for fraud.* When a creditor assails the validity of a conveyance by his debtor, or a conveyance whose consideration proceeded from his debtor, and his debt

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or demand is older than the date of the conveyance, the *onus* of proving a valuable consideration is cast on the grantee; and if the consideration is averred to be a debt of the grantor or debtor, he must prove the existence and validity of such debt.

2. *Weight of answer as evidence.*—An answer, not under oath, is not evidence for the respondent for any purpose; and when verified by affidavit (Code, § 3786), it is only evidence so far as responsive to the allegations of the bill.

3. *When answer is responsive, or not.*—When the bill, filed by a creditor, attacks the validity of a conveyance to the debtor's son, alleging that the purchase-money was paid by the debtor with his own funds; and the answer, admitting this fact, alleges that it was so paid in consideration of a debt due from the debtor to his son; this is not responsive, but is matter in avoidance, and must be proved.

APPEAL from the Chancery Court of Jackson.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 10th April, 1882, by Mrs. Martha A. Buchanan, suing for the use of W. L. Martin and others, against James M. Buchanan and his son, James A. Buchanan; and sought to set aside, as constructively fraudulent, a conveyance of a town lot in Scottsboro by one L. B. Jones to said James A. Buchanan, on the ground that the purchase-money was in fact paid by said James M. Buchanan; and to subject the property to sale for the payment and satisfaction of a decree for costs, which the complainant had obtained against said James M. Buchanan, in a suit for divorce instituted by her against him in said Chancery Court. The decree, a copy of which, duly certified, was made an exhibit to the bill, was rendered on the 18th January, 1881; and an itemized copy of the bill of costs, amounting to \$43.50, duly certified, was also made an exhibit. W. L. Martin was the register of the court, and the other persons for whose use the complainant sued were officers of the court, entitled to portions of the costs, as shown by the itemized bill. The deed of Jones to said James A. Buchanan, a certified copy of which was also made an exhibit to the bill, was dated the 25th May, 1881, and recited as its consideration the payment of \$50 in cash, but did not state by whom the payment was made. The bill alleged that the purchase and payment were made by said James M. Buchanan, the defendant in the decree, and that he was insolvent. A joint and several answer was filed by the defendants, admitting the rendition of the decree, and the execution of the deed, as alleged in the bill; and averring that the purchase of the lot was so made by the said James M. by agreement with the said James A., and the consideration paid was on account of moneys which the said James A. had previously loaned and advanced to his father. The answer was not under oath, an answer on oath having been waived by the complainant. The cause was submitted for decree, "on the bill of complaint, exhibits thereto,

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and joint answer of defendants"; and the chancellor rendered a decree for the complainant as prayed, declaring the conveyance fraudulent and void as against the complainant, and ordering the property to be sold for the satisfaction of her decree. The chancellor's decree is now assigned as error.

NORWOOD & NORWOOD, for appellant.

W. L. MARTIN, *contra*.

BRICKELL, C. J.—The cause was heard on the bill and exhibits, and the answer of the defendants. The exhibits, the genuineness and authenticity of which are admitted by the answers, and, being transcripts of judicial proceedings, are certified by the proper officer, and of themselves evidence, show the rendition of a decree in favor of the complainant, by a court of competent jurisdiction, for the payment of money, prior to the purchase by the defendant in the decree, of the parcel of land sought to be subjected to its payment, and its conveyance to his co-defendant. The burden of proving a valuable consideration for the conveyance, to avoid the subjection of the lands to the satisfaction of the decree, was cast on the party affirming the existence of such consideration. When the debt or demand of a creditor is prior in date of existence to a conveyance by the debtor, or to a conveyance the consideration of which proceeds from him, the burden of proving a valuable consideration for the conveyance, when the creditor assails its validity, is cast upon the grantee; and if the consideration of the conveyance is averred to be a debt of the grantor, or of the debtor from whom the consideration for the conveyance originally moved, the existence and validity of such debt must be proved.—*Hamilton v. Blackwell*, 60 Ala. 545; *Hubbard v. Allen*, 59 Ala. 282.

The answer is not verified, and, under the statute, is not evidence for the defendants. If it were verified, it would for the defendants be evidence only so far as responsive to the bill. Code of 1876, § 3786. The existence of an indebtedness from the judgment debtor to his son, the grantee of the conveyance, averred in the answer as the consideration moving the debtor to take the conveyance in the name of his son, is not responsive to any allegation of the bill. It is a distinct fact, set up in avoidance of the fact admitted in the answer, that the father with his own means had purchased the premises. It is an undoubted rule of evidence in equity, that an answer insisting upon a distinct, independent fact, in avoidance of a fact admitted in it, must be proved. The fact admitted is established, but the fact insisted on in avoidance must be proved by the re-

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spondent.—*Clements v. Moore*, 6 Wall. 299; *Hart v. Ten Eyck*, 2 Johns. 62; 1 Brick. Dig. 738, § 1467. Of the fact that the father was indebted to the son, and that the conveyance of the premises was taken to the son as a mode of paying the debt, there is no evidence; and the absence of such evidence entitled the complainant to a decree subjecting the premises to her demand.

Affirmed.

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Final Settlement of Executor's Accounts.

1. *Transcript; what is part of record.*—On appeal from a decree rendered on final settlement of an executor's accounts, a paper copied into the transcript, purporting to be the last will and testament of the decedent, but not appearing to have been admitted to probate, nor made a part of the record by bill of exceptions or appropriate reference, can not be considered for any purpose.

2. *Parties to settlement; presumptions on error.*—On final settlement of an executor's accounts, when the record shows that the decedent left a widow and minor child surviving him, and the decree recites that the infant, "under the construction of the will of the deceased, is not a necessary party to the settlement," but the will itself is not set out, nor its provisions any where shown by the record; this court can not assume, contrary to these recitals, that the decedent died intestate, thereby making the child a necessary party as a distributee, nor that the will, properly construed, made the child a necessary party as a legatee or devisee.

3. *Jurisdiction of Probate Court in matter of trusts; conclusiveness of decree.*—Where the will confers on an executor personal trusts, which may not expire when his executorial duties cease, and which can not be finally settled until, on the termination of the widow's life-estate, the property is delivered to the remainder-men, unless the executor and trustee resigns, dies, or is removed; while the Probate Court may make a final settlement of his accounts as executor, and the decree would be conclusive on the widow, who was a party to it; yet, as to the matters connected with the trust, the court would be without jurisdiction, and the decree rendered would be no protection to the executor in any future litigation with the remainder-men who were not parties to it.

APPEAL from the Probate Court of Mobile.

Heard before the Hon. PRICE WILLIAMS, Jr.

In the matter of the final settlement of the accounts and vouchers of George F. Werborn, as executor of the last will and testament of Adolph M. Solomon, deceased, to which he was cited by the widow, now Mrs. A. M. Pinney. The record shows that letters testamentary were granted to the executor on the 24th June, 1862; and the order granting them recites, that it

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was "known to the court that the last will and testament of said decedent was duly proved and admitted to record in this court." A paper is copied into the transcript, which purports to be the will of said decedent, but which is nowhere identified or referred to as the paper admitted to probate, and the order admitting it to probate is not set out. This paper contains the following provisions: "(1.) I give, devise and bequeath the property I may have, or which I may own at my death, whether real or personal, to my executors hereinafter named, to be held by them as trustees to carry out the provisions of this will. I empower them to carry on the mercantile business I may be engaged in at the time of my death, upon such terms, for such time, and in such manner as they may deem best for the interests of my estate, subject to the other provisions of this will; and they are not only to close the same when they think best, but also to sell, dispose of, re-invest and manage any part of the said interest, or any and all of my property, of any and every kind, upon their judgment, without any order of the court. In the conduct of said mercantile business, however, as well as in the closing of the same, and in the disposition, sale, re-investment and management of any portion of my property, my wife, Amanda M., must be consulted by my executors, and her consent to the action taken by them must be obtained in writing, and must be attested by at least two respectable witnesses. In case my wife and executors can not agree as to the foregoing matters, the proper courts of the country must determine and order the course to be pursued by my executors. (2.) After my just debts are paid, I give to my wife, Amanda M., the profits, use, enjoyment and income of all such property, of every kind, as I may have at my death, for the support, maintenance and education of herself and children as a family; but my wife shall not dispose of any part of the same, in any way, nor subject it, as I give her no interest except in conjunction with the children aforesaid as a family. I especially charge my said wife to employ any such income or profits to the liberal maintenance and education of any child or children, or its or their descendants, as may have been or may be begotten of her by me; and the provisions as to the maintenance and support of any other child or children shall take effect only so long as such other child or children may actually form part of my said wife's family, and be dependent upon her. (3.) At the death of my wife, I give, devise and bequeath the absolute ownership of my property, both real and personal, not consumed in the use aforesaid, to my child or children, or its or their descendants, that may have been or may be begotten of the said Amanda M. by me. But, in case she should leave no such child or children, or descendants as aforesaid of it or them, surviving her,

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then I bequeath such remainder to the children, or to any child of my said wife, as may then be living."

The executor appeared, in answer to the citation, and filed his accounts and vouchers, accompanied with an affidavit, in which he stated that Mrs. A. M. Pinney "is the widow of said deceased," and that "Adolpha Solomon is the daughter of said deceased by the said Amanda M., and is believed to be residing with her said mother, and to be a minor over fourteen years of age." Thereupon, the court appointed a day for the settlement, and appointed a guardian *ad litem* for the said minor. The guardian accepted the appointment, and filed numerous exceptions to the account stated by the executor. On a subsequent day, on motion of the executor, these exceptions were stricken from the files, and the order appointing the guardian *ad litem* was revoked, on the ground, as stated, "that Adolpha Solomon, daughter, a minor over fourteen years of age, is not, under the construction of the will of the deceased, a necessary party to the settlement of the estate." Exceptions to these rulings were reserved by the guardian *ad litem*, and several exceptions were reserved by the widow to other rulings of the court on the hearing; but the bill of exceptions was struck from the record, on motion, by this court.

The decree of the court, after reciting the appearance of the executor and the widow, thus proceeds: "The court, now proceeding to act upon said accounts, and to make a final decree and settlement of said estate, finds that said executor is chargeable with the sum of \$12,383.92 in treasury-notes of the Confederate States, as shown by the accounts stated by the court, and is justly entitled to credits, for sums paid out in said treasury-notes of the Confederate States, to the amount of \$1,646.43; leaving a balance of \$1,737.49, in said treasury-notes of the Confederate States. And the court then stated the account of said executor in United States currency since the late war, and finds that said executor is chargeable with the sum of \$3,557.66, as shown by the account as stated by the court, and is justly entitled to credits, including commissions, allowances, and costs of this settlement, to the sum of \$3,354.29; leaving a balance of \$203.37 to his debit. And the said executor is hereby directed to pay the said balance of \$203.37 over to said Amanda M. Pinney, to be by her received, held and applied as directed by the will of said testator; and to enforce the payment thereof, execution may issue in her favor against the said Werborn, if necessary. The court finds and decrees, also, that the said Amanda M. Pinney is entitled to have and receive from the said executor all the property of said estate not disposed of in course of administration; and thereupon the executor shows to the court that he turned over and delivered to the said Amanda

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M. household-furniture and a gold watch, amounting to the sum of \$534, which is admitted by the said Mrs. Pinney; and it appearing that the only property now appearing is the following," specifying it, "it is therefore ordered, that the said executor deliver and give possession of said lot of land, goods, shares of stock, &c., assets, to the said Amanda M., to be by her received, held and applied as directed in the will of said testator, and upon compliance therewith that he be discharged."

The appeal is sued out by Mrs. Pinney and the guardian *ad litem* jointly, and they assign errors separately. The errors assigned by the latter are, the striking out of the exceptions filed by him to the executor's accounts, and the order revoking his appointment. Mrs. Pinney assigns as error the several matters to which she reserved exceptions, and the final decree as rendered.

WATTS & SONS, with L. H. FAITH, D. H. LAY, and C. J. TORREY, for the appellants.—If the will of the testator is to be considered as a part of the record, it clearly shows that the minor was a necessary party to the settlement; and if the will is not to be considered as a part of the record, the minor was still a necessary party as a distributee of the estate.—*Frierson v. Travis*, 39 Ala. 150; *Hutton v. Williams*, 60 Ala. 133; *May v. Duke*, 61 Ala. 53; *Rowland v. Jones*, 62 Ala. 322; *Bondurant v. Sibley*, 37 Ala. 571. Considering the will as a part of the record, the decree is erroneous in directing the executor to pay over and deliver the property to the widow without requiring bond from her.—*Mason v. Pate*, 34 Ala. 379; *Perkins v. Lewis*, 41 Ala. 647; *Anderson v. McGowan*, 42 Ala. 280; *Calhoun v. Whittle*, 56 Ala. 138. The will creates, also, a personal trust, of which the Probate Court had no jurisdiction.

F. G. BROMBERG, and JAMES BOND, *contra*.—The will is no part of the record, and can not be looked to for any purpose,—certainly not to show error in the decree.—*Long v. Easley*, 13 Ala. 245; *Williams v. Gunter*, 28 Ala. 681; *Jones v. Jones*, 42 Ala. 221. Looking only to the recitals of the decree, as the court must, Mrs. Pinney was the only necessary party to the settlement; and whether she took, by the terms of the will, as sole legatee in her own right, or as trustee for the remaindermen, she was the only necessary party.—*Gaunt v. Tucker*, 18 Ala. 27. On this appeal, the construction of the will is not a question presented for decision.

STONE, J.—When Werborn, the executor, filed his account-current for final settlement, he filed therewith, as it was his duty to do, a sworn statement, specifying "the names of the

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heirs and legatees," &c.—Code of 1876, § 2509, subd. 3. In that affidavit he set forth, that his testator left surviving him his widow, Amanda M., now Mrs. Pinney, and an infant child, Adolpha Solomon, still an infant, but over fourteen years of age. A guardian *ad litem* was afterwards appointed for the infant, who filed many exceptions to the account-current. The executor thereupon moved the court to revoke the appointment of the guardian *ad litem*, and to disallow and reject the exceptions filed by him, on the alleged ground that the will gave the entire property to the widow, and hence the infant child had no interest in the settlement. The court granted these motions, and ruled that "Adolpha Solomon, daughter, a minor over fourteen years of age, is not, under the construction of the will of the deceased, a necessary party to the settlement."

We are required to consider this case in the absence of a bill of exceptions, as the one found in the record was not signed by the presiding judge within the time allowed by law. We have decided it is no part of the record. A paper, purporting to be a will signed by Adolph Solomon, is found in the transcript, but there is no evidence of its probate. There is nothing on the face of the proceedings which makes it a part of the record, and we are not informed why it is in the transcript. It is contended for appellant, that if we treat said will as a part of the record, then we must reverse the orders of the Probate Court noted above, because the will makes Adolpha Solomon devisee and legatee, to take effect at her mother's death, and she was therefore a proper and necessary party to the settlement; and the argument goes further, and claims that, if we treat the will as no part of the record, then Adolpha was a distributee in the estate of her father, and therefore interested in the distribution. So, taking either horn of the dilemma, it is claimed that the Probate Court erred. We feel constrained to hold, that the paper purporting to be a will is no part of the record in this cause, and that it can not be looked to for any purpose. The other branch of the argument is equally faulty. It asks us to assume that Adolpha was a distributee, or legatee under her father's will. If the record showed that Adolph Solomon died intestate, or if it were silent on the question, we would know in the one case, and possibly presume in the other, that Adolpha, his daughter, was entitled to distribution, and therefore interested in the settlement. But the record shows affirmatively that he did not die intestate. Werborn is every where styled executor, and the decree of the court affirms that Mr. Solomon left a will. Discarding from our consideration the paper found in the record purporting to be a will, we have for sole guide the recital in the decretal order of the court, that "Adolpha Solomon, daughter, is not, under the construction of

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the will of the deceased, a necessary party to the settlement." We can not presume error, and make it a basis for reversal.—1 Brick. Dig. 681, §§ 118, 119, 120. To sustain the ruling of the court, we must presume the existence of a will, which, properly construed, gave to the child no interest in the estate.

If the paper found in the record be a true copy of Mr. Solomon's will, we feel bound to express great doubt of the correctness of the ruling in the court below. The will places the entire property in trust, in the hands of the executors, after first paying testator's debts. It then gives the use, enjoyment and increase of the estate to his wife, Amanda M., "for the support, maintenance and education of herself and children as a family, . . . but she was not to dispose of any part of the same in any way, nor subject it." At the death of the wife, the absolute ownership of the property was to go to his children or child. The will confers on the executors other delicate trusts. Now, it may be conceded that, to the extent of collecting the assets, and paying the debts, the duties of the personal representative were executorial, and the Probate Court had jurisdiction to settle his accounts to that extent. The widow, Mrs. Pinney, being a party to that settlement, may be bound by it, as far as executorial duties are concerned. But how about the other questions? The paper, if the will, confided to the executor many trusts that are personal in their character, which may not expire when his duties *as executor* shall cease to be necessary. Over these trusts has the Probate Court any jurisdiction? Adolpha, the daughter, was not allowed to appear as a party to the settlement. Is she concluded? It would seem that only the use, enjoyment and income of the estate, was given to the widow, for the maintenance, &c., of herself and family. How about the *corpus*? Was there any authority to deliver any of that to the widow? And can there be a settlement of the trust, until, by the terms of the will, the child or children shall become entitled to the absolute ownership; unless the executor and trustee resigns, is removed, or some other ground exists for equitable interposition?—*Hitchcock v. U. S. Bank*, 7 Ala. 386, 437; *Camp v. Coleman*, 36 Ala. 163; *Perkins v. Lewis*, 41 Ala. 649; *Ex parte Dickson*, 64 Ala. 193; *Mason v. Pate*, 34 Ala. 379; *Lee v. Lee*, 55 Ala. 590.

We have felt it our duty to make the above suggestions and inquiries, because, to the extent the decree of the Probate Court was without jurisdiction, that decree will be no protection to the trustee in any future litigation.

Affirmed.

[Quarles v. Campbell.]

Quarles v. Campbell.*Application by Administrator, for Order to sell Lands for Payment of Debts.*

1. *Averments of petition, as to debts and insufficiency of personal assets.* A petition by an executor, or administrator, for an order to sell lands for the payment of debts (Code, §§ 2450, 2455), must allege, among other things, the existence of debts, their actual or estimated amount, and the insufficiency of the personal assets to pay them; though it is not necessary to give a particular description of either the debts or the assets, that being mere matter of proof.

2. *Proof of "necessity for sale."*—The "necessity for the sale"—that is, the existence and amount of valid debts, and the insufficient value of the available personal assets—must be proved by the depositions of disinterested witnesses, testifying to facts within their personal knowledge; but it is not necessary to prove affirmatively that the witnesses are disinterested, since that fact will be presumed in the absence of proof to the contrary.

3. *Deposition; indorsement by commissioner, showing title of cause.* The 64th rule of chancery practice, requiring the commissioner to indorse on a deposition the title of the cause in which it is taken (Code, p. 170), is directory merely, and the failure to make such indorsement does not render the deposition inadmissible as evidence.

APPEAL from the Probate Court of Lawrence.

In the matter of the estate of John B. Hawkins, deceased, on the application of D. B. Campbell, as administrator with the will annexed, for an order to sell lands for the payment of debts. The administrator's petition, which was filed in January, 1882, and duly verified by his affidavit, alleged that the decedent died seized and possessed of certain lands, which were particularly described; "that the personal property of said estate is insufficient to pay the debts thereof, and the will gives him [the petitioner] no power to sell the lands therefor"; and stated the names, ages and residence of the several heirs and distributees. The application was contested by Mrs. Parthena Quarles, one of the heirs, who demurred to the petition, on the following (with other) grounds: "because said petition does not state the debts, for which said lands are sought to be sold; and because said petition does not aver what debts, or amount of debts against said estate, have been presented or made known to said administrator, and yet remain unpaid, nor does it aver the description, amount or value of the personal effects of said estate, which could be applied to the payment of debts." The court overruled the demurrer, and held the petition sufficient.

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The administrator filed interrogatories to W. J. Gibson and W. T. Simmons, and offered their depositions as evidence on the hearing of the petition. The interrogatories propounded to each of the witnesses asked them to state—1st, whether they were acquainted with the lands belonging to the estate, particularly describing them; 2d, whether they were acquainted with the heirs and distributees, their names, ages, and residences; 3d, “Is the personal property of said estate sufficient to pay the debts thereof?”; 4th, “State anything else you may know, in behalf of the application.” Each of the witnesses answered, that he was acquainted with the lands, and that he knew one of the heirs, who was a minor; and in answer to the other interrogatories Gibson answered: “*No, there is no property; I know of no other way of paying the debts, but to sell said lands*”; while Simmons answered, “*No; I know of no way of settling said estate, but to sell said lands.*” The contestant objected to the admission of these depositions as evidence, because it was not shown that the witnesses were disinterested; and because the title of the cause was not indorsed on the envelope in which the depositions were inclosed. These objections were overruled by the court, and the record does not show that any exception was reserved by the contestant to this ruling; though the bill of exceptions recites, that “said depositions were sealed when delivered to said probate judge, and bore no evidence of any mutilation, or having been tampered with in any way.” The contestant objected, also, to the answers above quoted, “because said witnesses, by their said answers, merely express an opinion upon a subject-matter, or state of facts, without anywhere showing that they had any knowledge of the facts upon which said opinion was expressed; and because neither the interrogatory to which said answer was given, nor any other interrogatory propounded to them, calls for such an answer as would show the witnesses’ knowledge of the debts of the estate, or the amount thereof, and the amount and value of the personal property thereof; which objections were overruled by the court, and the evidence admitted; to which the contestant excepted.” The administrator himself was examined orally as a witness, at the instance of the contestant, and testified as to the amount of debts asserted against the estate, and as to the value of the different parcels of land sought to be sold. On all the evidence adduced, the court ordered a sale of all the lands, as prayed in the petition; to which order and decree the contestant duly excepted.

The overruling of the demurrer to the petition, the several rulings of the court on the evidence, and the final decree, are now assigned as error.

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E. H. FOSTER, for the appellant.

W. P. CHITWOOD, *contra*.

SOMERVILLE, J.—An application to the Probate Court for the sale of lands, for the payment of debts of a decedent, is required to be made by an executor or administrator. Its contents must state, 1st, an accurate description of the lands; 2d, the names of the heirs or devisees, and their places of residence; 3d, which of these, if any, are married women, infants, or *non compotes mentis*; 4th, that the estate of the deceased owes debts to a certain or an estimated amount; 5th, that the personal property of the estate is insufficient in value to pay such debts. The two last averments must be proved by the *depositions* of disinterested witnesses, which are required to be filed of record; and the application must be verified by oath. These are substantially the requirements of the statute.—Code, 1876, §§ 2450, 2455. Where there is a will, the fact should be so stated, and accompanied with the averment that it confers no power to sell the lands for the purpose of paying such debts. Code, § 2447.

The purpose of all pleadings is to eliminate an issue. They are required, therefore, generally to state *facts*, and not mere legal inferences, or conclusions of law.—2 Brick. Dig. 330, § 3. It is true that “the strictness of the old rules of pleading has been greatly relaxed, and courts of the present day do not lean to objections which can not affect the substantial justice of the case.” *Stein v. Ashby*, 24 Ala. 528. This is peculiarly true under our statutory system of pleading, so far as concerns mere defects of *form*. No objections can be allowed for such defects, “if *facts* are so presented that a material issue, in law or fact, can be taken by the adverse party thereon.”—Code, § 2978. So, it is provided, that “the plea must consist of a succinct *statement of the facts* relied on, in bar or abatement of the suit; and no objection can be taken thereto, if the facts are so stated that a material issue can be taken thereon.”—Code, § 2987. Of course, all pleadings which conform substantially to the *forms* prescribed by the Code, would be sufficient; and there are cases where the averments of conclusions, in the nature of mixed questions of law and fact, have been sustained by analogy.—*S. & N. R. R. Co. v. Thompson*, 62 Ala. 494, 500.

The application of the administrator, in the present case, did not come up to these requirements, and was obnoxious to at least one of the objections urged in the demurrer of the contestant. It is not averred by the petitioner that there are any debts due by the estate, or that they are of a given amount. But, as mere matters of evidence need not be pleaded, it was unneces-

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sary to describe the particular debts due. These were matter of proof, and not of allegation. So of the personal assets, a particular description of which was not required. If the petition had stated that their value was insufficient to pay the debts, this would have been the averment of a collective fact not liable to objection.

The court, in our opinion, erred in overruling the demurrer to the application.

It is further urged, that the evidence taken was insufficient to authorize the decree of sale. In this view we concur, for several reasons. The statute requires, that the "necessity of the sale"—or, what is the same thing, the insufficiency of the personal property for the payment of the debts—must be proved by *depositions* taken as in chancery cases.—Code, §§ 2455, 2458. This proof can be made only by showing the existence and amount of valid debts, and that the available personal property or assets are not of sufficient value to pay or discharge them. This is manifest from section 2456 of the Code, which provides that the court "may direct the sale of *all*, or *such portions* of the real estate, as may *be necessary* to pay the debts." Such an order would be impracticable, without proof of *the amount of the debts*, and the deficiency in value of the personal property.

These are important allegations, the burden of establishing which rests on the administrator; and if they are successfully controverted, the application can not be granted.—*Garrett v. Bruner*, 59 Ala. 513. This proof must be made by the depositions of disinterested witnesses, and filed of record. The depositions of the witnesses, Gibson and Simmons, contain no evidence of any indebtedness of the decedent. They are otherwise defective, also, in stating merely the deductions of the deponents, without any allegation of the facts within their knowledge from which such conclusions are deducible.

No affirmative evidence was required of the fact that the witnesses were disinterested. Their competency must be presumed, in the absence of evidence to the contrary; the burden of proof, in such cases, being always on the objecting party, to sustain his exception to the competency.—1 Greenl. Ev. § 390.

The neglect of the commissioner to indorse the title of the cause upon the envelope, as required by the 64th rule of chancery practice (Code, p. 170; § 4458), did not vitiate the admissibility of the inclosed depositions of the witnesses. Such indorsement is intended only as a convenient method of identification, and is directory merely.

The decree of the Probate Court must be reversed, and the cause remanded.

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Sullivan v. Lawler.

Bill in Equity by Distributees, against Administrator and other Distributees, for Account, Settlement, and Distribution.

1. *When distributees may sue, without administration.*—As a general rule, distributees or next of kin can not, in the absence of an administration duly granted, maintain a suit at law or in equity for the mere purposes of administration, nor, in the absence of special circumstances, maintain a suit for the collection of personal assets; and although there are exceptional cases, in which a court of equity will decree distribution directly to the next of kin, without the intervention of an administrator, when it is clearly shown that, if one were appointed, his only duty would be distribution; yet such relief will not be granted at the instance of the next of kin of a deceased adult legatee, upon a mere general allegation that there are no outstanding debts against his estate, when such allegation is made upon information and belief merely, and it is not shown that the information was obtained from persons having knowledge of the facts.

2. *When distributees or administrator may or must sue.*—When there is an administrator of the estate of a deceased legatee, he is the proper person to sue for the legacy; consequently, the next of kin, or distributees of his estate, can not join in a bill with the surviving legatees, making the administrator a defendant.

3. *When distributees may maintain suit against administrator and debtors, jointly.*—The distributees of a decedent's estate can not maintain a bill in equity against the personal representative and debtors of the estate jointly, without alleging fraud and collusion between them, or a refusal by the personal representative to sue for and collect the debts.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 18th February, 1882, by Rhoda Sullivan and others, children and grandchildren of Benjamin Lawler, deceased, claiming as residuary legatees under his will, against Benjamin F. Lawler, who was a son of said decedent; and prayed "that said Benjamin F. Lawler be required to account to complainants, as residuary legatees under the will of said Benjamin Lawler, deceased, for their interest in the said assets of said Benjamin's estate that went into his (the said Benjamin F.'s) hands; and that said Benjamin F. be required to produce all books, memoranda, vouchers, and accounts of sale in his possession, relating to the said assets that went into his hands, for inspection; and that they be produced on oath, in such manner as this honorable court shall think right and proper; and that said Benjamin F. make a full discovery of all assets of said estate that went into his hands; and orators

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pray for a reference to the register of this honorable court, to state an account against the said Benjamin F., charging him with all sums he is justly chargeable with, and giving him credit for all sums to which he is justly entitled; and that whatever sum may be found due to your orators may be paid over to them as their share of their said residuary interest in the same under the will of said Benjamin Lawler, deceased, and to those who are children and heirs-at-law of some of said distributees; and for such other and further relief as to the court may seem meet and proper."

Benjamin Lawler died in April, 1863; and his last will and testament, under which the complainants claimed as residuary legatees, was duly admitted to probate, in said county of Madison, soon after his death. Said will, a copy of which was made an exhibit to the bill, contained the following (with other) provisions: "I will and bequeath to my beloved wife, Rhoda, all my estate, real, personal, and mixed, during the term of her natural life, with full power to transact any and all business that she may think proper. It is my wish and desire, that my son Benjamin continue to live upon the premises, and give his attention to the business and interest of his mother. It is my will and desire, that my lands be divided in the following manner: . . . I will and direct, at the death of my wife, that all of my lands lying south of west line running by my gin-house to Flint river, be sold, and the proceeds arising from the sale be equally divided [among?] my daughters. The balance of my estate, at the death of my wife, I desire to be sold, and the proceeds to be equally divided between my children, share and share alike. . . . I will and bequeath to my grandson, James Wood, and my granddaughter, Rhoda Lou Wood, an equal share with my daughters." The testator's widow was appointed the executrix of his will, without bond or security; but the bill did not allege whether she had ever qualified as executrix, nor whether she was living or dead.

The testator's children, living at his death, were these: Rhoda Sullivan (a married woman, who was one of the complainants), Eliza Wilson (a married woman, one of the complainants), Martha Sanford (a married woman, one of the complainants), Caledonia Winston, Jehu Lawler, James H. Lawler, John Lawler, Jesse Lawler, and said Benjamin F. Lawler, the defendant. Mrs. Caledonia Winston, it was alleged, died, intestate, in September, 1879, "without being in debt;" and her children, as her heirs and distributees, were joined as complainants in the bill. Jesse Lawler died, intestate, on the 18th September, 1869, and letters of administration on his estate were granted to said Jehu and John Lawler; and while his widow and children were joined as complainants in the bill, it was

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alleged that said Jehu and John Lawler, the administrators, claimed to be creditors of his estate, and it was necessary that a special administrator *ad litem* of his estate should be appointed by the court. It was alleged that James Wood, the grandson of the testator, died, intestate, on the 10th November, 1881; and his widow and children were joined as complainants in the bill. As to the estates of said James Wood and Mrs. Caledonia Winston, the bill alleged, "that there are no debts against the said estates, as orators are informed and believe, and upon such information and belief state the facts to be, and no administration on said estates has been granted." On these facts stated in the bill, the complainants claimed that they represented and were entitled to "six-elevenths of said estate," and that the *defendants* were entitled to "the remaining five-elevenths;" but Benjamin F. Lawler was the only person who was named as a defendant to the bill.

As to the assets of the estate in the hands of the said Benjamin F. Lawler, and the grounds on which relief was sought against him, the bill contained these allegations: "Orators show that said Benjamin Lawler left a large amount of property on hand at his death, including a large number of bales of cotton, averaging from 475 to 500 pounds each; and that said Benjamin F. Lawler, one of the defendants hereto, some time previous to the death of his father, cultivated jointly with his father a large portion of the father's plantation, under contract that he, said Benjamin F., was to have one-fourth of the crops for his services in superintending the business, and in consideration of his labor and stock furnished by him; and that he was on the plantation superintending its cultivation on these terms, at his father's death, and so continued during said year 1863; and that a large quantity of cotton, corn, &c., were produced on said place during said year 1863. Orators charge that said Benjamin F. Lawler took possession of said cotton, corn, and other property on said place, which was the property of said Benjamin on hand at his death, and took possession of said property, corn, cotton, &c., produced on said place during the year 1863; and orators charge that they are entitled to a discovery from said Benjamin F. of said assets that went into his hands, and that this discovery is indispensable to the ends of justice; that orators have not a full, adequate, and complete remedy at law, for this purpose. Orators charge, that they are informed and believe, and upon such information and belief charge the facts to be, that said defendant has in his possession a book or books, memorandum or memoranda, or an account or accounts of sales of the assets of said estate of said Benjamin Lawler, deceased, vouchers for moneys pretended to have been received, for debts pretended to been paid out on account of

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said estate, none of which can be more particularly designated for want of more definite information on the subject; and that a production of said book or books, memorandum or memoranda, account or accounts of sales of the said assets, is necessary."

The chancellor dismissed the bill, on motion, for want of equity; and his decree is now assigned as error.

BRANION & JONES, for appellants.

CABANISS & WARD, *contra*.

BRICKELL, C. J.—While adhering to the general rule, that next of kin, or distributees, can not, in the absence of an administration duly granted, maintain suits at law or in equity for the mere purposes of distribution, nor, in the absence of special circumstances, maintain suits for the collection of personal assets; yet, in exceptional cases, when it is clearly and affirmatively shown that, if there was an administration, the only duty attaching to it would be distribution, courts of equity in this State have been accustomed to dispense with the administration, entertain suits by next of kin, and decree distribution directly to them.—*Fretwell v. McLemore*, 52 Ala. 124.

Within this exception it is insisted that the present bill is brought, in which the next of kin of deceased legatees join with the surviving legatees, praying a settlement of the testator's estate, and distribution to them directly. The deceased legatees were all probably adults—three of them certainly were; and upon information and belief it is averred, that upon the estates of three no administration had been taken, and that no debts exist against them. The other deceased legatee has personal representatives, who are made defendants, and there are debts existing against him. The allegation that there is no administration, and no debts as to three of the deceased legatees, is very general, and is made expressly, not upon knowledge of the facts, but upon information and belief, without any indication that the information was obtained from persons having knowledge, or the means of acquiring knowledge of the facts. It would be hazardous for a court of equity to depart from its general rules, upon an allegation so general and unsatisfactory, and render a decree which the parties affected by it can not safely obey, and which, so far from quieting, may become the fruitful source of future litigation. For, if an administrator should be appointed subsequently, he would not be bound by the decree, and it would not protect the parties against whom it is rendered, so far as the claims he could rightfully assert would be concerned.—*Gardner v. Gantt*, 19 Ala. 666.

But there is yet another fatal defect in parties to the bill.

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There is an administration of the estate of Jesse Lawler, a deceased legatee, whose next of kin are joined as complainants, while the administrators are made defendants. It is obvious, the administrators only can sue for and recover the legacy of their intestate. As well could the next of kin maintain a suit for the recovery of a debt due the intestate, wresting it from the due course of administration, as to maintain the present suit.

The bill also seeks the recovery of debts due the testator, without the averment of fraud or collusion between the debtor and his personal representatives. The debtors of a decedent can not properly be made parties to a bill against the personal representatives, by creditors or legatees, unless it be averred that there is collusion between them and the personal representative, or that he refuses to collect the debts.—Story's Eq. Pl. § 178. There is no such averment found in the bill.

We are satisfied that the demurrers, so far as sustained by the chancellor, were well taken; and the decree must be affirmed.

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Bill in Equity by Distributees, against Administrators and other Distributees, for Account and Settlement of Estate.

1. *Suits by administrator or distributees; who may sue.*—The title to the personal effects of a decedent, and the right to maintain personal actions, are devolved by law on the personal representative; and the general rule is, that he alone is authorized to demand, receive, collect, disburse and distribute the personal assets and claims of the estate; and while there are recognized exceptions to this rule, in which administration may be dispensed with, and other cases in which, the personal representative being estopped, or under disability to sue, a court of equity will lend its aid for the discovery and utilization of assets, a bill by distributees must aver the facts necessary to bring the case within one of those exceptions.

2. *Discovery; when bill lies for.*—A bill for discovery alone must not only aver the facts as to which a discovery is sought, and that those facts are within the knowledge of the defendant, but must also allege that they can not be proved without his answer; and this allegation, if denied, must be proved.

APPEAL from the Chancery Court of Madison.
Heard before the N. S. GRAHAM.

BRANDON & JONES, for appellants.

CABANISS & WARD, contra.
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STONE, J.—In October, 1878, Rhoda Lawler died, intestate; and in November, of the same year, Jehu and James H. Lawler, two of her sons, were appointed administrators of her estate. In February, 1882, this bill was filed; to which the chancellor sustained a demurrer, at the July term of the court, and dismissed the bill. No amendment was offered in the court below. The complainants in the court below prosecute this appeal, and assign as error the decree of the chancellor dismissing the bill.

Mrs. Lawler, intestate, left many descendants—some of them surviving children, and others descendants of deceased children. There are eleven full shares into which Mrs. Lawler's estate is to be divided, and some of those shares are to be subdivided into many sub-shares. The claimants and sub-claimants of six of the eleven shares are made complainants, and the claimants of the remaining five shares are made defendants. Among the latter are the two administrators, Jehu and James H. Lawler. Benjamin F. Lawler, another son of intestate, is also made a defendant. The object of the bill is to remove the administration into the Chancery Court, and to compel Benjamin F. Lawler to account, either to the administrators, or to the distributees, for an alleged indebtedness from him to intestate's estate. The bill is indefinite as to the amount of that indebtedness. It is not alleged in the bill that the administration is ready for settlement, nor, indeed, is it shown that any assets have ever come to the hands of the administrators; nor is there any averment as to whether the intestate owed any debts, or not. So far as the bill informs us, the alleged indebtedness from Benjamin F. constitutes the entire estate. There is no averment in the bill, that the administrators refuse, or are unwilling, to enforce the collection of the alleged indebtedness from Benjamin F., or that there is any impediment in the way of their doing so. No combination, or collusion, between said Benjamin F. and the administrators, is charged in the bill.

The general rule is, that the personal representative is alone authorized to demand, receive, collect together, and disburse and distribute the personal assets and effects of an intestate. The title to the personal effects, and the right to maintain actions personal, the law devolves on the personal representative. 1 Brick. Dig. 932, § 261, *et seq.* True, there are exceptional cases, in which administration may be dispensed with; and others in which chancery will lend its aid for the discovery and utilization of assets, where the personal representative is under disability to sue.—1 Brick. Dig. 959, § 632; *Ib.* 935, § 302; *Ib.* 649, §§ 136, 146; *Ib.* 651, § 171; *Lehman v. Meyer*, 67 Ala. 396. But, to be sufficient, the bill must aver facts which bring the case within the exception. The present bill avers no facts

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which take this case without the operation of the general rule, and, from all that is shown, the administrators have the exclusive right to bring Benjamin F. Lawler to a settlement.

Nor can the present bill be maintained as one for discovery, if it were otherwise sufficient. To maintain a bill on that ground alone, there must not only be an averment that the facts sought to be discovered exist, and are within the knowledge of defendant; but the bill must go farther, and allege, and, if the allegation is denied, there must be proof, that the alleged facts can not be proved without the defendant's answer.—1 Brick. Dig. 715, § 1067.

Affirmed.

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Bill in Equity by Distributees, against Debtor of Estate, for Discovery and Account.

1. *Discovery; when bill lies for.*—A bill for discovery alone must allege that the complainant can not make proof of the facts, as to which a discovery is sought, in any other way than by the defendant's answer.

2. *When distributees may sue, without administration.*—The general rule is, that distributees, or next of kin, can not maintain a suit for the mere purpose of distribution, until letters of administration have been granted on the estate of the decedent; and this rule must prevail, unless facts are affirmatively shown which bring the particular case within the recognized exception dispensing with an administration when it would be a useless ceremony.

3. *Same.*—Where the testator devised to his widow a life-estate in all his property, and directed "the balance" of the estate at her death "to be sold, and the proceeds to be equally divided among his children, making his widow executrix; administration on his estate, after the death of the widow, is necessary, before the remainder-men can maintain a suit in their own names.

4. *Conversion of crops between tenants in common.*—A tenant in common of crops, selling the entire property in them, is guilty of a conversion, for which the other tenant (or his personal representative, in the event of his death) may maintain an action of trover.

5. *Limitation of action for conversion, or suit in chancery on same demand.*—The statutory limitation of an action for the conversion of crops, brought by the personal representative of the deceased tenant against the surviving tenant in common, is six years (Code, § 3226); and a bill in equity by the distributees of the decedent's estate, filed nineteen years after the alleged conversion, can not be maintained, unless it avers facts which negative the bar of the statute at law.

APPEAL from the Chancery Court of MADISON.

Heard before the Hon. N. S. GRAHAM.

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[Sullivan v. Lawler.]

BRANDON & JONES, for appellants.

CABANISS & WARD, *contra*.

SOMERVILLE, J.—The bill is filed by the distributees of the estate of Benjamin Lawler, deceased, who died in the year 1863, leaving a will. The testator devised to his wife, Rhoda, a *life-estate* in all his property of every description, real, personal, and mixed. After making a devise of certain specific property, the will contained the following item: "The balance of my estate, at the death of my wife, I desire *to be sold*, and *the proceeds* to be equally divided between my children, share and share alike." The purpose of the bill is, to hold the defendant, Benjamin F. Lawler, a son of the testator, to an account for certain personal property, alleged to have gone into his possession in the year 1863. It consisted of cotton and corn, raised on testator's lands during that year, under an agreement which seems to have constituted the defendant and the testator, who farmed together, *tenants in common* of these products. This suit was commenced in February, 1882; and, a demurrer being interposed, the bill was dismissed by the chancellor, for want of equity. There was no allegation of the death of the widow; but the chancellor, in rendering the decree, considers an amendment as having been made, setting up this averment, in accordance with a suggestion of complainant's counsel made during the argument at bar. It may be further added, that the bill also prays for discovery.

The bill, in our opinion, was fatally defective; and the chancellor did not err in decreeing its dismissal. It can derive no aid in the aspect of the prayer for a discovery of assets. Such a bill can never be maintained, unless it alleges that the complainant is unable to make proof of the facts sought to be discovered, in any other way than by the defendant's answer. There is no such averment in the present bill.—*Crothers v. Lee*, 29 Ala. 337; *Perrine v. Carlisle*, 19 Ala. 686.

The general rule has always obtained in this State, that distributees, or next of kin, can maintain no suit for the mere purpose of enforcing distribution, until letters of administration have been granted upon the estate of the decedent. Until this step has been taken, as was said in *Gardner v. Gantt*, 19 Ala. 668, "the legal title can not be brought before the court, and therefore it can not be bound by the decree; nor can the court see that the trusts have been executed." The exception to this general rule is, that a court of equity possesses the power to dispense with the necessity of an administration on proper averments being made in the bill, accompanied by proof, that such administration would, if granted, be "a useless ceremony."

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Plunkett v. Kelly, 22 Ala. 655. The *onus* of alleging and proving this state of facts clearly rests upon the complainant in every suit. Unless the allegations of the bill affirmatively show the given case to fall within the *exception*, it must be held to be governed by the *general rule*.—*Fretwell v. McLemore*, 52 Ala. 124, 133; *Wright v. Lang*, 66 Ala. 389, 397.

We are of opinion, that the present case is not brought within the exception to the general rule. The language of the will contemplates an administration with the will annexed, after the death of the widow, who was appointed the testator's executrix. The testamentary direction is, that when her life-estate shall have expired, the remainder should be *sold*, and the *proceeds* of sale distributed to those entitled. This is a duty in the nature of an executory trust, devolved upon the administrator *cum testamento annexo*.—*Mitchell v. Spence*, 62 Ala. 450; *Perkins v. Lewis*, 41 Ala. 649. The testator had a right to designate the manner in which his bounty should be distributed, this right attaching as a necessary element to the ownership and *jus disponendi* of his property. Administration, then, can not be said to be a useless ceremony, but would rather seem to be necessary in order to carry out this trust created by the will, which may have been wisely intended to prevent disputes and litigation among the numerous distributees claiming an interest.

We need notice but one other defect in the case made by the bill. There is no allegation that the widow failed to qualify as executrix, or that there is no administration on the estate, and that the defendant has failed to account to such personal representative of the deceased. The defendant, according to the facts stated, was a mere tenant in common with the testator, owning an undivided fourth interest in the crops alleged to have been converted. It is the settled doctrine in this State, that if one tenant in common of a chattel sell the entire property, it is a conversion for which he would be liable in trover to his co-tenant, or to his personal representative.—*Smyth v. Tankersley*, 20 Ala. 212; *Perminter v. Kelly*, 18 Ala. 716. Such an action is barred by the statute of limitations of six years.—Code, 1876, § 3226. The present conversion is alleged to have taken place in the year 1863,—or about nineteen years before the bill was filed. When the life-tenant died is not shown, nor can we be presumed to know. Nor is it alleged that the decedent died free of debt, or that his debts have been paid, unless this fact can be inferred by a lapse of time less than twenty years, which is questionable.—*Jones v. Brevard*, 59 Ala. 499; *Baines v. Barnes*, 64 Ala. 375; *Goodwyn v. Baldwin*, 59 Ala. 127. It may be that there has been such administration, or that the widow qualified as executrix, which she was authorized to do without bond, and that as much as six

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years afterwards elapsed, so as to have barred the action for conversion. This contingency should have been negated by the complainants' bill; and in failing to do so by affirmative averments, it was wanting in equity.

These grounds are sufficient to authorize the decree of dismissal, to say nothing of the other grounds of demurrer, which we do not consider.

Affirmed.

Stovall v. Fowler.

Action for Statutory Penalty for Cutting Trees.

1. *Tax-sale; deed to purchaser, as color of title.*—When lands are sold for unpaid taxes, the deed to the purchaser, though it may be invalid as a conveyance of the title, is color of title, when possession has been taken and held under it; and is admissible as evidence for the grantee, or one holding under him, to show the extent of the possession according to the boundaries therein described.

2. *General exceptions to charges given or refused.*—A general exception to several charges given can not be sustained, unless each of them is erroneous; and in like manner, a general exception to the refusal of several charges asked can not be sustained, unless each one of them embodies a correct legal proposition applicable to the evidence.

APPEAL from the Circuit Court of Jackson.

Tried before the Hon. H. C. SPEAKE.

This action was brought by Richard F. Fowler, against William H. Stovall, and was commenced before a justice of the peace, on the 24th March, 1880. Being removed by appeal into the Circuit Court, the plaintiff there filed a complaint, claiming twenty dollars "as damages for cutting down two poplar trees by defendant, on land not his own, willfully and knowingly, without the consent of plaintiff, who was the owner of said land and trees;" and the same amount for "taking away two poplar trees, from land not his own," &c. The defendant pleaded not guilty, and issue was joined on that plea. On the trial, as the bill of exceptions states, it appeared that plaintiff claimed the land, a tract containing eighty acres, on which the trees were cut, under a quit-claim deed from his brother, Richard O. Fowler, which was dated 8th November, 1878, and recited the payment of \$80 as its consideration; and this deed was admitted in evidence without objection. Said Richard O. Fowler testified, as a witness for the plaintiff, that the land was not suitable for cultivation, and never had been cultivated, be-

72	77
93	111
72	77
94	141
72	77
98	187
72	77
104	352
72	77
109	381
72	77
123	136
72	77
142	257
142	700

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ing situated on a mountain; that it was entered about the year 1842, by a person whose name was not stated, and who abandoned it soon afterwards on discovering a mistake in the location of his entry; that the land then remained unoccupied, and not claimed by any one, until in May, 1867, when it was sold for the unpaid taxes of the year 1866, assessed against "owner unknown," and was bought by him at the sale; and he produced the deed of the probate judge to him, as the purchaser at the sale, dated April 6th, 1874. He further testified, that he held possession of the land, claiming it as his own, and paying the taxes on it each year, from the time of his purchase at the tax-sale, until he sold and conveyed to the plaintiff. The defendant objected to the admission of the deed as evidence, "because it is void on its face, in that it fails to show that said lands were assessed, the amount of taxes due and costs, or that any notice of assessment was given, or any publication of sale made." The court refused to admit the deed "as evidence of title, but permitted it to be read in evidence for the purpose of showing the extent and character of the witness' possession, and as color of title;" to which ruling, in admitting the deed as evidence for the purpose stated, the defendant excepted. On all the evidence adduced, the court gave three charges in writing, requested by the plaintiff, "to the giving of which," as the bill of exceptions recites, "the defendant duly objected and excepted;" and refused five charges in writing requested by the defendant, "and to such refusal the defendant duly objected and excepted." It is unnecessary to set out any of these charges, as the court does not determine the correctness of the legal principles therein asserted. All the rulings to which exceptions were reserved are now assigned as error.

PAUL L. JONES, and R. C. HUNT, for appellant.

ROBINSON & BROWN, *contra*.

BRICKELL, C. J.—The validity of the title derived from the sale for the payment of taxes is not, in this case, a material inquiry. The conveyance obtained under it was admissible as color of title, and to show the extent of the possession which had been taken and held by the purchaser and his vendee. When there is an entry upon lands under color of title, by deed or other instrument in writing, and a continuous occupancy, in legal contemplation, there is "actual possession to the extent of the boundaries contained in the writing; and this, though the title conveyed is good for nothing."—2 Smith's Lead. Cases (5 Am. Ed.), 563; *Allen v. Kellam*, 69 Ala. 442.

2. The exceptions to the instructions given, and to the in-
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structions refused, are too general to avail the appellant, unless it could be asserted there is error in all the instructions given, and that all requested embody correct legal propositions applicable to the evidence.—*Elliott v. Stocks*, 67 Ala. 336; *Cohen v. The State*, 50 Ala. 108. Without entering upon a discussion of the instructions, it is apparent this can not be asserted in reference to them.

Let the judgment be affirmed.

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Bill in Equity by Purchaser, for Specific Performance of Contract for Sale of Land, and for Partition.

1. *Purchase pendente lite*.—A purchaser of land from a party to a pending suit, in which the title or an interest therein is involved, is concluded by the decree afterwards rendered, to the same extent that his vendor is concluded.

2. *Conclusiveness of decree in chancery*.—When the complainant voluntarily dismisses his bill, the decree dismissing it "is very like a voluntary nonsuit at law, which does not bar a second suit;" but, where the decree recites that the cause "again came on to be heard, on the papers formerly read, and the answer of the defendant, with the exhibits filed with said answer, and with general replication to said answer, and upon the report of the master commissioner, made in pursuance of the decretal order of the last term, and was argued by counsel;" and then proceeds, "on consideration whereof, and on motion of the plaintiff, the court doth adjudge, order and decree, that the bill of plaintiff be dismissed, and that he pay to the defendant his costs in this behalf expended, but the defendant is not to be barred or precluded by this decree from asserting or recovering, in any proper suit, any balance which may be found due him by the plaintiff, as set out and asserted in the answer of said defendant, growing out of the account asked for in said bill;" this, it seems, is not a voluntary dismissal by plaintiff, but rather only shows that he moved for a decree in the cause.

3. *Proof of handwriting by comparison*.—When the genuineness of a writing or signature is disputed, extraneous writings, though admitted to be genuine, can not be presented to the court or jury, nor shown to a witness, that he may institute a comparison between them and the disputed one.

4. *Same*.—A person who has seen another write, or who knows his handwriting, may express his opinion as to the genuineness of a disputed signature, though he be not an expert; and experts may go further—may institute comparisons between the disputed writing and those admitted to be genuine, and give their opinion whether both were written by the same person, or whether a particular writing or signature is genuine or forged.

5. *Waiver of objections to illegal evidence*.—"Parties may try their controversies on illegal evidence, if they choose to do so;" and if they do not object to illegal evidence when offered, the court may properly consider it.

72	79
84	112
94	602

72	79
103	652

72	79
112	354

72	79
118	131
119	296

72	79
124	568

72	79
126	508

72	79
131	216

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6. *Impeaching and sustaining witness.*—When the testimony of a witness has not been impeached, evidence should not be received to sustain his credibility.

7. *Revision of chancellor's decision on facts.*—This court will not reverse the chancellor's decision on a question of fact, unless clearly convinced that he erred; and this general rule applies in this particular case with greater force than usual, since the chancellor had before him the original writing, the genuineness of which was in issue, and other writings admitted to be genuine, none of which are before this court.

8. *Specific performance of contract.*—A court of equity will not specifically execute every contract into which parties may lawfully enter; nor does it necessarily follow that a specific performance will be decreed, because a rescission has been refused at the instance of the defendant, in a former suit between the parties, and that decree is binding as *res adjudicata*. It is always a matter within the judicial discretion of the court, whether to grant or refuse a specific performance; and it may and should be refused, unless the contract is not only legally binding, but also fair, just, and reasonable in all its parts; in other words, there must be "a valuable consideration, particularity, certainty, mutuality, and a necessity for performance."

9. *Same.*—A specific performance is refused in this case, because the evidence is held insufficient to show that the contract was supported by an adequate consideration, and was fair and just in all its parts.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. HENRY C. SPEAKE.

The original bill in this case was filed on the 15th January, 1874, by John S. Moon, a resident citizen of the State of Virginia, against Zachariah R. Lewis, also a citizen of Virginia, John M. Crowder and William P. Newman, who resided in Madison county, Alabama, and several other persons; and sought, principally, the specific performance of a contract, a copy of which was made an exhibit to the bill, and which was in these words:

"Being indebted to John S. Moon, for various professional and other services in connection with the estates of Daniel P. Lewis, deceased, Nicholas P. Lewis, deceased, Zachariah Lewis, deceased, and Howell Lewis, deceased, we agree that said John S. Moon shall, in consideration thereof, be entitled to one-half of our tract of land situated in Madison and Morgan counties, in the State of Alabama, and one-half of the property thereon; which estate and property, we, the undersigned, John O. Lewis and Zachariah R. Lewis, have heretofore been working in partnership; and we bind ourselves to make to the said John S. Moon a good title to one undivided half of said real and personal property. The estate herein sold was formerly the property of Nicholas Lewis, deceased, and came to us through our father and D. P. Lewis, deceased. This sale of our property is not to interfere with our contract with George T. Thomas for the cultivation of said land, or a part thereof; but said John S. Moon is to be entitled to one-half of what may be made under our contract with said Thomas. The fulfillment of this con-

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tract on our part is to be a full satisfaction to said Moon of all his claims against us jointly. Signed by us this 10th day of December, 1868."

"J. O. & Z. R. LEWIS,
by Z. R. LEWIS."

Under this contract, the complainant was put in possession of the lands and other property, jointly with his vendors; and they cultivated the lands during the year 1869, having one Sweeney in possession as manager and agent. John O. Lewis having become a bankrupt soon after the date of said contract, the complainant became the purchaser of his interest in the lands and property at a sale made by the assignee in bankruptcy. In February, 1873, Z. R. Lewis sold and conveyed to said Crowder and Newman, in consideration of \$2,500 by them paid, all of his interest in said land and property; and Newman sold and transferred his interest to Crowder pending this suit. The bill sought, also, a partition of the lands, the complainant claiming a three-fourths interest, and an account of the rents and profits and sales of personal property; and the said George T. Thomas, mentioned in the contract sought to be enforced, was made a defendant, as being interested in the account, together with the assignee in bankruptcy of said John O. Lewis.

An answer to the bill was filed by Z. R. Lewis, in which he denied the execution and validity of the contract sought to be enforced; alleging that, if he signed it (which he denied), it was procured by false representations on the part of said Moon as to its contents, and when he was incapacitated by drunkenness from understanding its provisions. A similar answer was filed by Crowder and Newman; and they asked that their answer might be taken as a cross-bill, seeking to charge said Moon with the rents and profits of the property which he had received, over and above his interest acquired by the purchase at the bankrupt sale. In reply to the defenses and claims set up in the answers and cross-bill, the complainant relied on a decree rendered in a suit in Virginia growing out of the same matters, which he pleaded as *res adjudicata*. The material facts relating to this suit are stated in the opinion of the court.

On final hearing, on pleadings and proof, the chancellor rendered the following decree: "It is ordered, adjudged, and decreed by the court, that the plea of *res adjudicata*, interposed by said Moon to the cross-bill of Crowder and Newman, be, and the same is hereby sustained. It further appearing to the satisfaction of the court that the written agreement referred to in the pleadings, bearing date December 10th, 1868, was duly executed by said Z. R. Lewis, but the proof and proceedings failing to show that said agreement should be specifically enforced; and it further appearing that said John S. Moon, by

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purchase at bankrupt sale, is the owner of John O. Lewis' interest in the lands in the pleadings described as the old Nich. Lewis plantation, situated in Morgan and Madison counties, together with the personal property thereon situated at the time of his said purchase, and that Crowder and Newman are the owners of the interest of Z. R. Lewis in said property; and it further appearing that said Crowder, since the commencement of this suit, has purchased said Newman's interest therein; it is now therefore ordered, adjudged, and decreed by the court, that the lands in the pleadings described be, and the same are hereby declared to be, held as tenants in common between said complainant and said Crowder equally, as tenants in common, and that the same should be divided between them into lots equal in value." The decree then appointed commissioners to make the partition, and proceeded thus: "It is further ordered, that it be referred to the register to ascertain—1st, how much of the personal property on said plantation on the 1st January, 1870, was used, consumed or sold by the said John S. Moon, or the said Crowder and Newman, and when so used, sold or consumed, and calculate interest on said amounts to the first day of the next term of this court; 2d, how much was the rental value of said lands for the years 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, and 1879, deducting from each year's rent the value of all permanent improvements erected each year, calculating interest on each year's rent, less said deductions; 3d, how much was paid out by the said Moon, or by the said Crowder and Newman, upon the indebtedness of the said Z. R. and J. O. Lewis; to whom paid, and when paid; and whether either of said parties paid out any attorney's fees, in and about litigation against said Z. R. and J. O. Lewis, and, if so, to whom paid, how much, and when; calculating interest thereon from the time of said payments to the first day of the next term of this court," &c.

The complainant having died pending the suit, the cause was revived in the name of Samuel H. Moore, as his administrator; and the appeal is sued out by said administrator, who here assigns as error the refusal to decree a specific performance of the contract as prayed, the final decree as rendered, and the overruling of demurrers to the cross-bill of Crowder and Newman.

D. P. LEWIS, and D. D. SHELBY, for appellant.—(1.) The matters set up by Z. R. Lewis, Crowder and Newman, against the rights asserted by the complainant's bill, deny the execution, consideration, and validity of the contract sought to be enforced; and these identical matters were set up, and relied on as grounds of relief, in the former suit between the parties in

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Virginia. As to these matters, the decree rendered in that suit is conclusive.—*Pettus v. Tankersly*, 61 Ala. 354; *McDonald v. Mobile Life Insurance Co.*, 65 Ala. 358; 1 Greenl. Ev. § 528. By express constitutional provision, the same effect must be accorded to this decree in the courts of Alabama as in the courts of Virginia.—Const. U. S., art. iv, sec. 1; 2 Story on Const. § 1309. The conclusiveness of such a decree, in the courts of Virginia, is shown by the case of *Taylor v. Yarrowborough*, 13 Grattan, 183. The terms of the decree preclude the idea of a voluntary dismissal of the bill by the plaintiff, even if he then had the right to dismiss it, which is denied; and show that, while the plaintiff moved for a decree, the court decided the case on its merits—on the pleadings and proof. *Borrowscale v. Tuttle*, 5 Allen, Mass. 377; Bigelow on Estoppel, 110, 122-3; *Hill & Braxton v. Sutherland*, 1 Wash. Va. 128; *Barker v. Cleveland*, 19 Mich. 230. The chancellor allowed the plea of *res adjudicata*, and yet refused to grant relief as to the matters thus conclusively established; and therein, it is insisted, he erred, to the prejudice of the complainant.

(2.) But, aside from this plea, and independently of it, on the other evidence shown by the record, the complainant was entitled to a specific performance of the contract as prayed. On all the grounds on which the validity of the contract was assailed, the burden of proof was on the defendants who asserted its invalidity; while the preponderance of the evidence, as to each of these disputed questions of fact, is against them. The genuineness of the signature of Z. R. Lewis is proved by a large number of witnesses, business men who were familiar with his handwriting; and is only denied by himself in some (not all) of his sworn statements, and by members of his family. As to his condition, mental and physical, when he signed the contract, the testimony of himself and the complainant, who were alone present at its execution, is repugnant and irreconcilable; his testimony being negative in its character, and its credibility seriously impaired by the numerous inconsistencies found in his several statements at different times, while that of the complainant is positive and distinct, consistent in its details, and unimpeached by other witnesses. The consideration of the contract is abundantly proved; and though the testimony of Z. R. Lewis, in one or more of his depositions, impeaches it as to the value of the services performed by the complainant, there is no effort to sustain his testimony by that of John O. Lewis, whose deposition was taken by the defendants.

HUMES & GORDON, with L. P. WALKER, *contra*.—(1.) If

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there be any inconsistency or repugnancy in the chancellor's decree, as urged by appellant, it would avail him nothing, unless the decree itself is shown to be wrong; since a correct judgment or decree will not be reversed, although it may be founded on a wrong reason.—*Wilkinson v. Bradley, Wilson & Co.*, 54 Ala. 677; *Mitchell v. Pitts & Henry*, 61 Ala. 219; *Telegraph Co. v. Meyer*, 61 Ala. 159; *Gassenheimer v. Huguley*, 64 Ala. 83; *Nicholson v. Moog & Co.*, 65 Ala. 471.

(2.) The decree rendered in the Virginia suit was not conclusive as to the matters here litigated. It was not, and does not purport to be, a determination of the merits of the controversy, but is a mere voluntary dismissal, the equivalent of a voluntary non-suit at law, and does not bar another suit.—*Dan. Ch. Pr.*, 4th Amer. ed., 811, 659, 790, 796, note 5; *McBroom v. Somerville*, 2 Stew. 515; *Porter v. Kingsbury*, 77 N. Y. 164; *Watson v. Cowdrey*, 23 Hun, N. Y. 169; *Cummins v. Bennett*, 8 Paige, 79; *Thomas v. Thomas*, 3 Litt. 9; *Bassard v. Lester*, 2 McCord's Ch. 421; *Smith v. Smith*, 2 Blackf. 232; *Simpson v. Brewster*, 9 Paige, 245; *Elderkin v. Fitch*, 2 Carter, Ind. 90; *Walker v. Carroll*, 65 Ala. 62; 1 Bland's Ch. 206, 17 Amer. Dec. 277-87. The reason for the dismissal of that suit may be found in the prayer of the bill in this case, which asked that the defendants here might be enjoined from prosecuting their rights in any other court, and be compelled to litigate all the matters in controversy with the complainant in this suit; and the complainant can not now be heard to set up, as a bar and estoppel, a voluntary compliance with the prayer of his own bill. That decree of dismissal was rendered after the institution of this suit, and, for that reason, can not be pleaded in bar of it.—*State v. Spikes*, 33 Ark. 801; 5 Sawyer, C. C. 312; *Rollins v. Henry*, 84 N. C. 269; 73 Ill. 415.

(3.) On the merits of the case, the complainant was not entitled to a decree for the specific performance of the alleged contract, because he failed to prove, as the rule requires, that the contract, if actually signed, was fair, just, and reasonable in all its parts, and was supported by an adequate consideration. *Goodlett v. Hansell*, 66 Ala. 131, and authorities there cited. The execution of the contract, or the signature of Z. R. Lewis, is denied by said Lewis, and is not satisfactorily proved; while the consideration, as proved by the complainant himself and other witnesses, taken in connection with the relation existing between the parties, and the condition of said Lewis at the time, presents a case in which the court might actively interfere to set aside the contract.—*Hale v. Brown*, 11 Ala. 87; *Holland v. Barnes*, 53 Ala. 83; *Foster v. Johnson*, 70 Ala. 249; *Davis v. Snider*, 70 Ala. 315. If the evidence as to any of these issues only leaves the fact in doubt, or does not clearly show

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that the chancellor's decision is wrong, the decree must be affirmed.—*Marlowe v. Benagh*, 52 Ala. 113; *Rather v. Young*, 56 Ala. 94; *Derrick v. Brown*, 66 Ala. 162.

STONE, J.—The present suit was instituted, in January, 1874, by John S. Moon; and its prayer and purpose are, to obtain specific performance of an alleged contract of sale, bearing date December 10th, 1868. The agreement which the bill seeks to have performed, purports to have been signed and executed in the names of "J. O. & Z. R. Lewis, by Z. R. Lewis," and, on a valuable consideration recited, binds the obligors to convey to Moon an undivided half interest in a large tract of land, and personal property thereon. The property mentioned in the agreement had been owned by J. O. & Z. R. Lewis as equal tenants in common, and had been worked by them as a plantation, in partnership. John O. Lewis, very soon after the date of said agreement—December 10th, 1868—became a voluntary bankrupt; and his interest in said plantation and personal property was sold by the assignee, under an order of the court in bankruptcy, and John S. Moon became the purchaser; the sale was confirmed, and a deed made to him by the assignee. The pleadings and evidence in the present record do not deny or question John S. Moon's right to John O. Lewis's interest—an undivided half—in said real and personal property. His purchase at the bankrupt sale gave him that interest, even if the alleged agreement of December 10th, 1868, be inoperative. Hence, this suit raises no question as to that half interest. John O. Lewis, Z. R. Lewis, and John S. Moon were all residents of the State of Virginia, while the property in controversy in this suit is in Morgan and Madison counties in the State of Alabama. Moon was a practicing attorney-at-law; and the recited and alleged consideration for the contract of sale of December 10th, 1868, is professional services theretofore rendered by him for the brothers Lewis. Pending this suit, Moon has died, and Samuel H. Moore is his personal representative.

In 1871, Z. R. Lewis filed a bill against Moon, in the State of Virginia, to have the alleged contract of December 10th, 1868, set aside and cancelled. The particular ground on which the bill prayed to have that contract vacated was, as averred in that bill, that Moon had obtained the signature of Z. R. Lewis to it, when the latter was so drunk as to be unconscious of what he was doing, and by falsely stating to him that the paper did not bind or affect him, Z. R. Lewis, but only affected, and was intended to benefit, John O. Lewis. There was a broad and emphatic issue on these averments. No testimony appears to have been taken in that cause, but it remained in court undecided, until after this bill was filed.

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In 1873, while said suit was pending in Virginia, Z. R. Lewis sold and conveyed his interest in the lands and personal property in controversy, to Crowder and Newman, residents of Huntsville, Alabama; and thenceforth they claimed and took control of said interest of Z. R. Lewis, claiming it was one undivided half of all of said property. That claim, the manner of its assertion, and certain antagonisms and unfriendly relations which sprang up between them and Moon, gave rise to this suit. Newman sold his interest to Crowder, and the latter now claims all of Z. R. Lewis's interest.

The Virginia suit was finally disposed of, June 30th, 1874. The language of the decree is: "This cause came on this day to be again heard, on the papers formerly read, and the answer of John S. Moon, with the exhibits filed with said answer, and with general replication to said answer, and upon the report of master commissioner, Wm. M. Perkins, made in pursuance of the decretal order of the October term, 1872, and was argued by counsel. On consideration whereof, and on motion of the plaintiff, the court doth adjudge, order and decree, that the bill of plaintiff be dismissed, and that he do pay to the defendant his costs in this behalf expended. But the defendant, J. S. Moon, is not to be barred or precluded by this decree from asserting or recovering, in any proper suit, any balance which may be found due him by the plaintiff, as set out and asserted in the answer of John S. Moon, growing out of the accounts asked for in his said bill."

A question, which meets us at the threshold of this case, may be thus stated. The *gravamen* of the Virginia suit, instituted by Z. R. Lewis, was, that the alleged contract of December 10th, 1868, was improperly or fraudulently obtained by Moon. That suit was pending, and at issue, when Crowder & Newman purchased Z. R. Lewis's interest. Moon, through his agent, Sweeney, was then in possession of the lands in controversy—not the exclusive possession, but in possession, claiming a three-fourths interest, and conceding to Z. R. Lewis only the remaining one-fourth interest. The pendency of the suit, and the possession, were each constructive notice to Crowder & Newman of Moon's claim. But, in addition to this, they had actual notice of it.

We have seen above, that Z. R. Lewis's bill was dismissed at his costs. The object of the present bill, as we have seen, is to obtain specific performance of the said contract of December 10th, 1868; and if the relief prayed for be granted, Moon will be the owner of three-fourths, and Crowder of one-fourth of the tract. In answer to this suit, the defendants again set up the invalidity of the said contract of December 10th, 1868. The defense goes further than Z. R. Lewis's bill, and denies

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that Lewis ever signed the contract, and pleads *non est factum* to it, in bar of the recovery sought by the bill. To this defense Moon replies, setting up the decree dismissing Z. R. Lewis's bill, as a former recovery, conclusively settling and decreeing the validity of said contract. It is replied to this, in argument, that the dismissal of that bill was on the motion of Z. R. Lewis, the plaintiff therein, without a trial on the merits, and consequently the doctrine of *res judicata* does not apply. The chancellor sustained the defense of former recovery, and held that the decree rendered in the former suit is a bar to all further inquiry into the validity of the contract of December 10th, 1868.

There can be no question, that if Z. R. Lewis is concluded by that decree, Crowder is alike concluded. He stands in the relation of privy in estate to Z. R. Lewis, with notice, both constructive and actual, that that suit was pending, and of the object for which it was instituted. If he desired to avoid its effect, he should have taken control of its prosecution.

The decree dismissing the Virginia suit is not in the form usually employed, when a complainant desires to abandon the further prosecution of his suit. Such order of dismissal generally makes no reference to pleadings or evidence, argument of counsel, or submission of the cause. There is, in fact, no submission—nothing on which the judgment of the court is invoked. Enough, in such case, that the record show that the complainant came and dismissed his cause, and the decree of the court thereon. No judgment, in such case, is pronounced on pleadings or evidence. It is very like a dismissal, or voluntary non-suit at law, which does not bar a second suit. The decree in the cause we are considering recites, that there was a hearing “on the papers, formerly read, and the answer of John S. Moon, with the exhibits filed with said answer, and with general replication to said answer, and upon the report of the master commissioner, Wm. M. Perkins, made in pursuance of the decretal order of the October term, 1872, and was argued by counsel.” All these are very appropriate words, when there is a submission for a decree on a real issue. They are very inappropriate, when complainant simply has his bill dismissed on his own motion. The decree then proceeds; “On consideration whereof, and on motion of the plaintiff, the court doth adjudge, order and decree, that the bill of plaintiff be dismissed,” &c. Now, it is our duty, in construing writings, to give some meaning to each clause and word, if we can. We have no authority for rejecting, as useless and meaningless, all the recited words of submission, copied above, and the additional words, “on consideration whereof.” Why consider the papers formerly read, the answer of John S. Moon, with its exhibits, the general replication to the answer, and the report of the master

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commissioner, if plaintiff moved to dismiss his own cause? Almost all orders of court are made on the motion of some party to the proceedings. Courts rarely act *ex mero motu*. Is it not more rational to conclude, that the words, "on motion of the plaintiff," were inserted to show that plaintiff was the party who moved for decree in the cause, and not that he moved for decree of dismissal. This gives operation to all the words, and relieves the court of all imputation of listening to the arguments of counsel, and considering the merits of the controversy, on a motion by plaintiff to dismiss his own cause out of court. We deem it unnecessary, however, to decide this question.

The chancellor, after sustaining Moon's plea of former recovery, went farther, and announced that it appeared, to his satisfaction, that the said agreement of December 10th, 1868, was duly executed by Z. R. Lewis. The testimony in this record, bearing on the question of execution *vel non* of said agreement, is very voluminous; we may add, in some cases unusually prolix. There were many objections filed to interrogatories and the answers thereto; and, in our opinion, many of those objections were well filed. Other portions of the testimony, clearly illegal, do not appear to have been objected to. In this State, we do not permit extraneous papers to be presented before the jury or court, or shown to a witness, that he may institute a comparison between such paper, though admitted to be genuine, and the one in controversy.—*Bestor v. Roberts*, 58 Ala. 331; *Kirksey v. Kirksey*, 41 Ala. 626.

The competency of persons to give their opinions, as to whether a given signature is in the proper handwriting of the person it purports to have been made by, is not confined to experts. Any witness who has seen the party write, or who knows his handwriting, may express his opinion, as to the genuineness of the signature. Of course, the extent of his familiarity with the handwriting, will enter into the weight of his testimony. Whar. Ev. §§ 707-8; 1 Greenl. Ev. §§ 596 7; 1 Brick. Dig. §§ 1078, *et seq.* Experts may go farther; but then, to legalize such testimony, the witness must be first shown to be an expert; that is, accustomed to, and skilled in the matter of handwritings, genuine and spurious. These may institute comparisons between writings of unquestioned genuineness, and the writing in dispute, and may give their opinion whether both were written by one and the same person. They may, also, give their opinion whether a given writing is a genuine, or a feigned or forged signature. There are certain other matters pertaining to handwriting, about which they can give their skilled opinions, not necessary to be here considered.—1 Whar. Ev. § 718; 1 Greenl. Ev. § 440; *Tullis v. Kidd*, 12 Ala. 648; *Blackman v. Collier*, 65 Ala. 311; *Young v. O'Neal*, 57 Ala. 566.

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Each of the parties to this suit has, in some cases, introduced extrinsic writings, for comparison, without objection; and, to that extent, such testimony was properly regarded by the chancellor. Parties may try their controversies on illegal evidence, if they choose to do so.

There is a great deal of illegal evidence, offered to sustain the credibility of witnesses, whose testimony has not been impeached. *Baucum v. George*, 65 Ala. 259. And there is a good deal of hearsay evidence. All this should have been disregarded.

It is a rule in this court, if a chancellor has announced a finding on testimony, we will not reverse his finding, unless clearly convinced he erred.—*Rather v. Young*, 56 Ala. 94; *Bryan v. Hendrix*, 57 Ala. 387; *Smith v. Inman*, 70 Ala. 108; *Derrick v. Brown*, 66 Ala. 162. But there are stronger reasons than usual, why this rule should be observed in this case. The chancellor had before him, not only the original contract, upon the genuineness of which he was required to pronounce, but he had many other admitted signatures of Z. R. Lewis, which appear to have been put in evidence without objection. The advantage he derived from an inspection of those signatures, is denied to us. We feel bound to affirm the decree of the chancellor on this, the main disputed question of fact, and would feel inclined to find as he did, if the question stood unaffected by his finding.

In the final decree in this cause, the chancellor, after ascertaining that the contract sued on was the contract of Z. R. Lewis, went farther, and announced that the proof and proceedings failed to show that such agreement should be specifically enforced.

It is not every contract parties enter into, that chancery will specifically enforce. Nor does it necessarily follow that, because the Chancery Court refuses to set aside an executory contract at the suit of one of the parties, it will compel its specific execution at the suit of the other. There is a wide margin of discretion, which separates the principles of relief in the two cases. In fact, it is always within the enlightened discretion of the chancellor, whether he will decree specific performance in any case; not an arbitrary or capricious discretion, dependent on the whims or caprice of the chancellor, but a discretion reduced to rules, and clearly defined. To call the powers of the Chancery Court into exercise in such a case, it is not always enough that the contract is legally binding. It must be fair, just, and reasonable in all its parts. This is what is meant by the phrase, 'judicial discretion,' in such cases. "A valuable consideration, particularity, certainty, mutuality, and a necessity for performance, are requisites upon which the equity of a case arises."—Whar. on Spec. Perf. § 6; 5 Wait's Ac. & Def. 764-5; Sto. Eq. Jur. §§ 741-2; *Gould v. Womack*, 2 Ala. 83;

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Casey v. Holmes, 10 Ala. 776; *Goodlett v. Hansell*, 66 Ala. 151. So, the plea of former recovery—*res judicata*—if fully made good, is not conclusive of Moon's right to specific performance.

As we have said, the testimony in this cause is very voluminous, and much of it is illegal. It leaves the parties most directly interested in the issue subject to criticism, if not to animadversion. Crowder and Newman purchased from Lewis, when they knew Moon asserted a right to half the interest they were buying, and when they knew a suit was pending to test the validity of that claim. This savors of maintenance. They purchased at a very low figure; and Mr. Crowder has employed methods, at least questionable, in getting up testimony in the cause. Z. R. Lewis is three times examined. He casts some distrust over his testimony, by showing that his answers were written out anterior to his appearance before the commissioner, and that, in giving his answers, he read from his manuscript. Some of his answers in the second deposition indicate that his mind was not in proper poise when they were given. Moon testifies, that he proposed to Crowder, as the agent of Z. R. Lewis, to pay three thousand dollars for the latter's interest in the property. This was before Crowder purchased the same interest for the lesser sum of twenty-five hundred dollars. Crowder does not deny that Moon made such offer, but testifies to a confident recollection that he informed Lewis of this offer before the latter sold to him and Newman. Yet he fails to prove this fact by Lewis, although he had his deposition taken three times. But this case is not to be determined on the weakness of Crowder's claim.

Moon's testimony stands almost unsupported, in the matter of the value of his services, which he testifies constituted the consideration of the contract of December 10th, 1868. G. C. Gilmer gives him the best support as to value, but G. C. Gilmer was not an attorney at law. The alleged consideration was, that through Moon's exertions and influence, D. P. Lewis was induced to execute a codicil to his will, by which he released the brothers John O. and Z. R. Lewis from the payment of all interest on a bond they had given for a half interest in the lands in controversy, and a large amount of personal property. As we understand the testimony, D. P. Lewis, and his attorney in fact, G. C. Gilmer, at that time claimed of J. O. and Z. R. Lewis twenty thousand dollars of interest, and only twenty thousand, although much more was due. The codicil, drawn by the attorney of Mr. Gilmer, was executed, and the Lewis brothers released. Mr. Moon's description of the services he rendered is in substance as follows: G. C. Gilmer was largely a beneficiary under the will and a deed which had been executed by D. P. Lewis. Lewis was an old and infirm man, had never been

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married, and had great confidence in Gilmer, with whom he lived. Moon caused the report to be started and circulated, that the will and deed of D. P. Lewis, which so benefited G. C. Gilmer, would or could be assailed and set aside, for want of capacity in D. P. Lewis to make them; that the threat to assail the deed was brought to the knowledge of Gilmer and his counsel; that Moon and Gilmer's counsel had an interview and an understanding, which resulted in the execution of the codicil. Moon was present, with the Lewis brothers, and as their counsel, when the codicil was executed. D. P. Lewis died soon afterwards; his will and codicil were probated and established, and the Lewis brothers released from the payment of all interest on the bond. They were not liable for the principal of the bond, under its express terms, and under the will of Nich. Lewis, through which they all claimed title. This is, substantially, Mr. Moon's statement of the services he rendered, which he says constituted the consideration for the contract of December 10th, 1868. True, he places the sum, from which he alleges he procured their release, at a higher figure, and says that, computing his compensation at 10 per cent. of the sum he saved them, it should have been larger. He also mentions other services performed for them—counsel in other matters—but fixes no price upon them. These services he says he agreed to surrender, in the settlement of December 10th, 1868, and accepted the contract of that date, in full discharge of all claim against the two brothers. As part reason for taking this course, he testifies that J. O. Lewis was then hopelessly insolvent, and about to go into bankruptcy; and that the financial condition of Z. R. Lewis was precarious. He "took counsel of his fears," and accepted the payment secured by the contract of December 10th, 1868, in full satisfaction.

It is difficult to estimate the value of the services herein above set forth. Aside from the questionable methods by which he says he obtained their discharge from liability, we are at a loss to assign to the services their proper standing in judicial lore. Skilled knowledge commands higher wages, by reason of the long, weary days and nights—the *viginti annorum lucubrationes*—consumed in its acquisition. Subjected to this test, we are still without a standard for its valuation. Such services can not certainly be assigned a place in the higher fields of attorneyship, and we doubt if they should be measured by a scale of per-centage. Aside from all this, the testimony on the question of consideration is neither harmonious nor satisfactory. Z. R. Lewis testifies that, if he signed the contract, he did it without reading it, and upon a false statement by Moon of its contents. Both he and John O. Lewis testify that, when they were returning home after the execution of the codicil, Moon in-

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formed them that his charge was one thousand dollars. Z. R. Lewis testifies he paid this sum, in 1869. Moon testifies the thousand dollars was paid for his services afterwards rendered in resisting the contest of D. P. Lewis' will.

Another circumstance weighs upon our deliberations. Mr. Moon was adviser and chief director, though not the penman, in preparing J. O. Lewis' petition and schedules, when the latter made his surrender in bankruptcy. This was very soon after the contract of December 10th, 1868, was executed. No mention was made in the schedules of the agreement of sale to Moon, but the bankrupt's right was put down as a half interest, subject to liens.

The testimony does not make it clear there was an adequate consideration for the contract, and fails to show it was fair and just in all its parts.

The decree of the chancellor is affirmed.

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Action on Common Money Counts.

1. *Bill of particulars; how made part of record.*—"A list of the items composing the account sued on" (Code, § 2984), like a bill of particulars at common law, is not a part of the record, unless made so by bill of exceptions; and when not so presented, it can not be considered by this court for any purpose.

2. *Action for money had and received, by mortgagor against mortgagee; lies when.*—When mortgaged property has been sold under a power in the mortgage, and the proceeds of sale have been paid to the mortgagee, an action of assumpsit lies against him, in favor of the mortgagor, to recover the surplus remaining in his hands after paying the mortgage debt and the reasonable costs.

3. *Same; proof of partial payments; statute of limitations as defense.* In such action, a material issue is as to the correct balance due on the mortgage debt, and the amount of credits to which the mortgagor is entitled; and proof of items for goods or chattels delivered as partial payments can not be rejected, because an action to recover their value would be barred by the statute of limitations, when the statute is not pleaded.

4. *Same; partial payments to mortgagee after assignment.*—Partial payments made to the mortgagee, after an assignment of the mortgage, are nevertheless valid credits, if he was in fact authorized to receive them as agent of the assignee.

5. *Same; purchase by mortgagor at sale under power; voluntary payment.*—If the mortgagor himself, acting through a third person, become the purchaser at the sale under the mortgage, the payment of the price bid can not be considered a payment voluntarily made, since the title to the land would not be divested by full payment of the debt before the sale, and the sale could only be avoided in equity; but, where the mortgage is of personal property, a different rule might prevail.

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6. *Same; whether action lies against mortgagee or assignee.*—The action lies against the mortgagee, although he has paid the money over to the assignee, when it appears that he joined with the assignee in making the sale, collected the money as agent for him, the assignee being a non-resident, and knew that the mortgagor claimed that the debt was paid.

7. *General objection to evidence partly admissible.*—A general objection to evidence, as “incompetent and irrelevant,” may be overruled, if any part of the evidence is admissible, although a part is objectionable as secondary evidence.

APPEAL from the Circuit Court of Limestone.

Tried before the Hon. H. C. SPEAKE.

This action was brought by James Woods, against Charles B. Hayes, and was commenced on the 15th July, 1881. The complaint contained only the common money counts, claiming \$800, alleged to be due from defendant to plaintiff, 1st, for money had and received October 1st, 1880; 2d, “by account stated on the 1st October, 1880, for goods, wares and merchandise sold and delivered;” and, 3d, “by account for money paid.” The defendant pleaded, 1st, “that he is not indebted to plaintiff as charged in his complaint;” 2d, payment. Issue was joined on both of these pleas. At the November term, 1881, as the judgment-entry recites, “came the parties by attorneys, and defendant excepts to the bill of particulars furnished by plaintiff; which exceptions are overruled by the court, and defendant excepted.” Indorsed on the transcript, after the clerk’s final certificate, is a memorandum entitled “Bill of particulars,” with defendant’s objections (or exceptions) to its sufficiency; but there is no reference to it as a part of the record, nor is it made a part of the bill of exceptions reserved on the trial at the next term. On the trial, the defendant reserved several exceptions to the rulings of the court in admitting evidence offered by the plaintiff; some, on the ground that the particular items were not included in the bill of particulars furnished to him, and others on various grounds specially assigned, which appear in the opinion of the court. All the rulings to which exceptions were reserved on the trial are now assigned as error.

W. R. FRANCIS, and WATTS & SONS, for appellant.

McCLELLAN & McCLELLAN, *contra*.

SOMERVILLE, J.—When *an account* is the foundation of a suit, the statute provides that, at any time previous to the trial, the defendant is entitled, on notice, to “a list of the items composing it.”—Code, 1876, § 2984. This is, in effect and substance, the same as the common-law bill of particulars. *Robinson’s Adm’rs v. Allison*, 36 Ala. 525. That, however,

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was never regarded properly as a part of the record, and our practice is to make it so by incorporating it in the bill of exceptions.—1 Phil. Ev. (C. H. & E. notes), 4th Ed. 799; *Com. v. Davis*, 11 Pick. 432; *Prior v. Johnson*, 32 Ala. 27. This view precludes us from considering the memorandum copied in the record, and purporting to be a bill of particulars. It should have been embraced in the bill of exceptions, as a part of the proceedings in the cause.

The present suit is in *assumpsit*, embracing several counts, including *money had and received*, *goods sold*, and *money paid at request*. The exceptions reserved are all taken to the rulings of the court below on the evidence. The correctness of these are readily determined by a few plain principles of law of easy application.

The plaintiff in the lower court mortgaged his lands to the defendant, to secure a debt payable to defendant, for something over two hundred dollars. Very soon afterwards, the note and mortgage was assigned by the payee to one Black, for value received. Defendant, acting for the assignee, sold the land, for the sum of one hundred and fifty dollars, to one Phillips, who seems to have purchased at the request of plaintiff. The purchaser paid the mortgagee, Hayes, the sum of one hundred and twenty-six dollars and seventy-five cents, the amount claimed to be due on the mortgage debt, and he paid the balance to the plaintiff, Woods. The plaintiff claims that the mortgage debt was paid, and sues for the money. The items claimed as credits embrace chattels delivered, and money alleged to have been paid before and after the assignment of the mortgage debt.

There can be no doubt of the proposition, that when a mortgagee, in the exercise of a power of sale, sells either land or personal property conveyed by the mortgage, and has any *surplus* money remaining in his hands after paying the debt and reasonable costs, an action of *assumpsit* will lie against him, at the instance of the mortgagor, to recover it. As it is sometimes stated, "the mortgagee becomes a *trustee* for the mortgagor, as to the surplus received.—2 Jones Mort. §§ 1924-25, 1940; Jones Chat. Mort. § 817; *Blecker v. Graham*, 2 Edw. (N. Y.) 647; 1 Brick. Dig. 140, §§ 72 *et seq.* A most material issue, in all such cases, is the true and correct amount of the mortgage debt; and therefore, necessarily, the sum of the credits to which the debtor is justly entitled as payments upon it.

All the items of credit excepted to as evidence, either fall properly under the count for goods sold by the plaintiff to the defendant, or money had and received, or paid by request; or else there was evidence tending to show that they were to be considered payments on the mortgage debt. The fact that the

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item for cord-wood, and perhaps some others, were barred by the statute of limitations, can be of no benefit to the defendant, inasmuch as the statute was not pleaded, as is required to be done, in such cases, in courts of law.—*Huss v. Central R. R., &c.*, 66 Ala. 472; Ang. Lim. 285.

It is immaterial that some of the alleged payments on the mortgage debt were made *after* the assignment of it to Black. If made at any time, to one authorized to receive the money, they would, *pro tanto*, discharge the debt, and to this extent increase the surplus in the hands of the mortgagee, to which the plaintiff would become entitled after foreclosure under the power.

It is contended, that the money was paid by the plaintiff to the defendant *voluntarily*, because he authorized Phillips to bid for him at the mortgage sale. This would be a correct position, if the sale had been absolutely void, and not merely voidable, as the evidence shows it to be.—*Beene's Adm'r v. Collenberger*, 38 Ala. 647. But, even if the mortgage debt was entirely paid, such payment would not, in the case of *land*, operate to re-invest the title in the mortgagor, so as to defeat an action of ejectment at law. The legal title being still in the mortgagee, he could sue for the possession, and recover, although a different rule applies in cases of suit for personal property. *Slaughter v. Swift*, 67 Ala. 494; *Burns v. Campbell*, at the present term. The foreclosure, therefore, was only voidable in a court of equity, unless its preventive power by injunctive relief had first been invoked. The payment, in this view of the matter, can not be regarded as voluntary. It may rather be presumed to have been made by the mortgagor to save his property from sacrifice; or, as this court has said in another case, when discussing the subject of voluntary payments, "because there was an apparent subsisting means of enforcing the demand, without a resort to judicial proceedings, and *without giving the party [plaintiff] a day in court.*"—*Town Council v. Burnett*, 34 Ala. 400, 407, *per* WALKER, J.

There is no force in the argument, that defendant can not be made liable, because he was acting as the agent of the assignee of the mortgage, and had paid the proceeds of sale over to him. The sale was the joint act of himself and Black, both uniting to execute the power, as shown in the advertisement of sale. He also acted as Black's agent, the latter being a non-resident, and collected the money. He, furthermore, had notice of the fact, that the plaintiff denied his liability for the mortgage debt, on the ground that it had been paid. He should have held the fund in dispute until the rights of the contesting parties were determined.—2 Jones Mort. § 1940; *Yarborough v. Wise*, 5 Ala. 292; 2 Greenl. Ev. § 125.

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The objection was properly overruled, which was taken to the plaintiff's statement, made when under examination as a witness, that "the mortgage was foreclosed, and the land sold on the 15th of November, 1880, and the balance due thereon (one hundred and twenty-six dollars) paid over to John W. Black." This evidence was not admissible, perhaps, for the purpose of proving the sale, which was afterwards proved by production of the deed and mortgage; and if the objection had been placed upon the ground, that the first clause of the statement was mere *secondary* evidence, it might have prevailed, as being correctly taken. But this point was waived by the broad objection urged against the whole of it, as being "incompetent and irrelevant."—*David v. David's Adm'r*, 66 Ala. 140; *Kilpatrick v. Pickens County*, *Ib.* 422.

We discover no error in the record, and the judgment is affirmed.

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Statutory Real Action in nature of Ejectment.

1. *Disclaimer, or statement limiting plea of not guilty.*—In ejectment, or the statutory action in the nature of ejectment, when the defendant disclaims as to a portion of the premises sued for, he is required to "state distinctly upon the record the extent of his possession" (Code, § 2963); which statement must designate with reasonable certainty the part as to which he disclaims, or the part as to which he defends, and, if wanting in that requisite certainty, may be stricken from the record on motion, leaving the plea of not guilty to operate as an admission of possession of the entire premises; but it is not subject to demurrer, on account of such uncertainty or indefiniteness.

2. *Error without injury in admission of evidence.*—Error in the exclusion of a deed as evidence, when offered in connection with the certificate of acknowledgment only, is cured by the subsequent admission of the deed on proof of execution by the attesting witnesses.

3. *Objection to question or answer.*—The allowance of an improper question to a witness, against objection, is not an error which will work a reversal, when the record does not show that illegal evidence was thereby elicited and admitted.

4. *Bill in equity; when admissible as evidence in another suit.*—A bill in equity, not sworn to, is regarded as the mere suggestion of counsel, and is not admissible as evidence against the complainant in another suit; but, when duly sworn to by him, it is an admission of the facts therein stated, and admissible as evidence against him in another suit.

5. *Lease construed; stipulation for continued possession of lands cleared and cultivated.*—A stipulation in a written lease for the term of three years, that the lessee shall have the right to occupy for three years such portions of the lands as he may clear and reduce to cultivation each year of the term, runs with the land, and is binding on a purchaser, or as-

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signee of the reversion; and when sued by the purchaser or assignee, on the expiration of his original term, the lessee may show his right to the continued occupation of the portions of land cleared and cultivated under this stipulation.

6. *Injunction; violation of, not cognizable at law.*—The violation of an injunction while in force is a contempt of the court from which the writ issued, and may be punished by that court while the proceedings are *in fieri*; but a court of law can not take cognizance of it, nor allow it to operate as a forfeiture of legal rights in another suit, when it is not shown that the injunction has been perpetuated by a final decree.

7. *Impeaching witness by proof of former statements.*—An affidavit made by a witness in another suit can not be received to impeach his testimony as given orally, unless the two statements are contradictory and irreconcilable as to a material matter.

8. *Answer in chancery; whole admissible, when part has been read.* When parts of an answer to a bill in equity have been read in another suit as evidence against the respondent, he has the right to read the whole of it as evidence.

9. *Charges requested ignoring material facts, or requiring explanation.* Charges requested, which ignore or obscure material evidence, or which require additional instructions to prevent them from misleading the jury, may be refused.

10. *Charges given, having tendency to mislead.*—A charge given, having a tendency to mislead the jury, is not an error which will work a reversal of the judgment, since the appellant, by apprehending injury from it, might have asked explanatory instructions.

11. *What will sustain action.*—A charge given, instructing the jury that, “before they can find for the plaintiff, they must be convinced from the evidence that he was seized and possessed of the lands sued for before the bringing of this suit, and that since said possession accrued defendant dispossessed him,”—though susceptible of a construction which, by requiring actual possession on the part of the plaintiff, as an essential element of his right to recover, would assert an erroneous proposition, is yet susceptible also of another construction, which would assert a correct proposition—that is, that the plaintiff must have had a seizin in law, giving him a constructive possession, or drawing to it the right of immediate possession.

APPEAL from the Circuit Court of Cherokee.

Tried before the Hon. L. F. Box.

This action was brought by Andrew J. and P. A. Callan, against Fleming McDaniel, to recover the possession of a tract of land, with damages for its detention; and was commenced on the 27th January, 1881. The land sued for was thus described in the complaint: “A part of the east half of the north-east quarter, and the west half of the north-west quarter, of section twelve (12), township nine (9), range ten (10); and the south-east quarter of section eleven (11),” same township and range, “and all that part of the north-east quarter of section fourteen (14),” same township and range, “in the Coosa land district, lying on the north-west side of Chattooga river, and containing in all 326 acres, more or less, and known as the William Gray place, near Gaylesville in said county of Cherokee, and lying west of the large branch that divides a certain tract of land *willed* by said Gray to Milly Smith and Rachel

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Moyher, and also lying north of Chattooga river." The defendant filed a plea in these words: "The defendant says he is not guilty of the matters alleged in plaintiffs' complaint, except as hereinafter stated, to-wit: for further plea, the defendant says, that he is not now, nor was he at the commencement of this suit, in the possession of the lands described in said complaint, except about twenty-seven (27) acres, to-wit: the house and lot on which he resides, and about twenty-six (26) acres of bottom lands, which the defendant has cleared and put in cultivation on said lands since the 1st day of March, 1878, under and by virtue of a lease in writing made to the defendant by plaintiffs' lessor; and defendant disclaims the possession of any part of said lands mentioned in said complaint, at and before the commencement of this suit, except that part of said lands stated in this plea." To this plea the plaintiff demurred, "1st, because said plea of disclaimer is indefinite, and is not specific and sufficient as to the portion of land as to which he does not disclaim; and, 2d, because it should set out said land by definite and certain description, which it fails to do; and because it does not show said lease was unexpired, or set out said lease sufficiently, and is insufficient in pleading a lease." The court overruled the demurrer, and required the plaintiff to take issue on said plea; and the cause was tried on issue joined on that plea.

The plaintiffs claimed the lands under a deed from Milly Smith to them, which was dated the 10th January, 1881, attested by two witnesses, and purported to be executed in Bartow county, Georgia; and appended to it was a certificate of acknowledgment, in the statutory form, purporting to have been made by the ordinary of said county of Bartow, on the day of the date of the deed; and also a certificate of the judge of probate of said county of Cherokee, as to the filing and registration of said deed in his office on the 26th February, 1881. On the trial, as the bill of exceptions states, the plaintiffs offered this deed in evidence, "with the indorsements thereon." "The defendant objected to the introduction of said deed, and the court sustained the objection, and refused to allow said deed to go to the jury; to which ruling the plaintiffs excepted." The plaintiff then proved the handwriting of the attesting witnesses to said deed, and their residence in Georgia; and on this proof the deed was admitted in evidence, and was read to the jury. The plaintiffs then introduced a witness who testified to the rental value of the lands, "and that the defendant was in possession of the houses and lots and part of the bottom lands. Said witness was asked, on cross-examination, when did the defendant clear the bottom lands, and who is in possession of said twenty-six acres; to which question plaintiffs objected,

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but the court overruled the objection, and permitted the witness to answer; and plaintiffs then and there excepted."

The defendant had entered into possession of the lands, and still held and claimed the right to hold the portions for which he defended, under a written lease dated April 9th, 1878, which was in these words: "This indenture, or contract, entered into between Milly Smith, of Bartow county, Georgia, of the first part, and Fleming McDaniel, of Cherokee county, Alabama, of the second part: Know all men by these presents, that I, Milly Smith, of the first part, have this day leased to the said F. McDaniel, of the second part, so much of my land now unimproved, and lying in Cherokee county, Alabama, near Gaylesville, and lying on the Chattooga river, upon the following conditions: The said McDaniel is to build, at his own expense, a comfortable house or houses, such as he may need for his own use; and he is to clear twenty acres, more or less, as he can, this year, and to have the use of the same for the term of three years, or for three crops; and what he clears during the second and third years, he is to have and use upon the same terms. The said McDaniel is to inclose the lands he clears with a good and lawful fence; and is to sell all the wood he can from the clearings, and to pay me one-half the proceeds of sale. The lease [is] to commence running from the 1st January, 1878; and at the expiration of three years, the said McDaniel is to give possession of the first year's clearing, if he does not choose to rent upon such terms as we could agree upon; and so, of the clearings of the other two years. In case I should sell said lands before the expiration of said lease, the said McDaniel is to give possession, by being paid a reasonable valuation for the unexpired term of said lease; provided, also, that the said McDaniel shall not be required to give possession, or surrender the lease, in the spring of the year, after having made arrangements for a crop on said lands, unless said lease should be surrendered upon terms agreed on by both parties. The said McDaniel is to have the refusal of renting the old lands." (Signed, "F. L. BRANDON, agent for *Milly Smith*;" and also signed by said McDaniel, and attested by two witnesses.)

The defendant offered this lease in evidence, and the plaintiffs objected to its admission, "because there was no proof of its execution, and no proof that said Brandon was the agent of Milly Smith, and was authorized to execute said lease." The court sustained the objection, and excluded the lease. "The defendant then offered in evidence a bill in chancery, filed against him by said plaintiffs, with the exhibits thereto; to the introduction of which the plaintiffs objected, but the court overruled the objection, and allowed said bill and exhibits to be read to the jury as evidence; and plaintiffs then and there duly

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excepted." This bill was filed on the 5th December, 1878, and was verified by the oath of one of the plaintiffs. Its object and prayer was to enjoin and restrain the defendant, said McDaniel, from cutting timber, or otherwise committing waste on the lands sued for, which the complainants alleged they had purchased from said Milly Smith on the 14th November, 1878, taking her bond conditioned to make them a good title on the payment of the purchase-money, which bond was made an exhibit to the bill. The lease to McDaniel was also made an exhibit to the bill, and its execution was thus alleged in the bill: "Heretofore, on the — day of April, 1878, one Milly Smith was seized and possessed in fee of certain lands situated in said county, and hereinafter more particularly described; and being so seized, by a certain indenture, or contract, bearing date the 9th April, 1878, made between said Milly Smith and said Fleming McDaniel, did demise, let or lease to said McDaniel all that portion or parcel of land unimproved, known as the Gray place," &c. The bill alleged, also, that the complainants "have demanded possession of said property so described as aforesaid, and although they have tendered to said lessee, McDaniel, a fair valuation for said improvements, or any improvements, and a reasonable valuation for the unexpired term of said lease, he refused to surrender the possession to your orators, and still refuses; and said McDaniel is insolvent, and unable to respond in damages for any injury, trespass, or waste committed on said lands."

"The defendant then testified as a witness for himself, as follows: 'I took possession of said lands in the *fall* (?) of 1878, in February. I cleared six acres of said land in the bottom in 1879, in the summer.' Plaintiffs objected to said last answer as evidence, because irrelevant under the issue, and excepted to the overruling of their objection. The defendant's counsel then asked him, 'Do you remember the day you put Mr. Callan in possession of the land in controversy? if so, state it.' Plaintiffs objected to this question, because it was illegal, irrelevant, and leading, and because it embodied a presumption; which objection being overruled by the court, the defendant answered, that he put said Callan in possession, or surrendered possession of said twenty acres of bottom land to him, some time last year. Defendant then stated, on cross-examination, that he took possession of the land in controversy in the spring of 1878. He was then handed a writing, and was asked if he signed and swore to said writing; and answered, that he did." (This writing is not set out, nor does the bill of exceptions show what it was.) "M. M. Russell was then introduced as a witness, and testified that defendant cleared about six acres of the lands in controversy in the summer of 1879. Plaintiffs' coun-

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sel handed said Russell an affidavit, and asked him if he signed and swore to said paper; and he answered, that he did." This affidavit, which was afterwards offered in evidence by the plaintiffs, was sworn to and subscribed on the 22d October, 1879, and seems to have been used in the chancery cause, in defense of some motion or proceeding for a contempt of the injunction, though that fact is not stated. In it said Russell stated on oath that, "of his knowledge and belief, said McDonald has not cut, felled and destroyed any timber upon said land, outside of his clearing, either on or about the 4th day of August, 1879, or at any other time, in contempt of the order of this honorable court; nor has he entered upon said tract, nor, with others employed by him, cut, felled or destroyed any timber; nor does he believe that said McDaniel has ever avowed any intention to continue to clear up said lands." When this affidavit was offered in evidence by the plaintiffs, the defendant objected to its admission, and the court sustained the objection; to which ruling the plaintiffs duly excepted. The record does not state for what purpose the affidavit was offered, nor on what ground it was objected to and excluded.

The plaintiffs offered in evidence, in rebuttal, the writ of injunction issued in the chancery cause, by which the defendant was restrained "from committing or permitting any further waste or destruction of timber, and from cutting, clearing or felling timber on said lands;" which writ was issued on the *fiat* of a circuit judge, on the filing of the bill, and was served on the defendant on the 13th December, 1878. The court excluded the writ as evidence, on motion of the defendant, and the plaintiffs excepted. The bill of exceptions does not state the purpose for which this evidence was offered, nor the ground of objection to it. One of the plaintiffs being examined as a witness, he was asked by defendant, on cross-examination, "Did not defendant clear up, in the summer of 1879, some six acres of land in the bottom?" The plaintiff objected to this question, "because irrelevant, and because the defendant could not claim a benefit from acts done after he was enjoined from doing them, and after plaintiffs' purchase of the land." The court overruled the objection, and the plaintiffs reserved an exception; and the witness answered the question in the affirmative. The plaintiffs offered in evidence a paragraph contained in the defendant's answer to the bill in chancery, in which he stated that he had cleared up and put in cultivation, in the spring of the year 1878, "a large body of said lands, known as 'river bottom lands,' to-wit, about twenty-eight acres;" and the court allowed the defendant, in rebuttal, to introduce his entire answer; to which ruling admitting it the plaintiffs excepted.

"This being all the evidence," the court gave the following

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charges to the jury, on the request of the defendant: (1.) "If the jury believe, from the evidence, that the defendant delivered or surrendered said lands, or that plaintiffs were in possession of all that portion of the lands they were entitled to under their purchase, before this suit was brought, then plaintiffs can not recover." (2.) "That before the jury can find for the plaintiffs, they must be convinced from the evidence that plaintiffs were seized and possessed of said lands before the commencement of this suit, and that since said possession accrued defendant dispossessed them." (3.) "That if plaintiffs were, at the commencement of the suit, in possession of all except the lands on which defendant's lease had not expired, then they can not recover." (4.) "That plaintiffs were bound by any leasal contract made by Milly Smith, their vendor, with the defendant."

The plaintiffs duly excepted to each of these charges as given, and then requested the following charges, which were in writing: (1.) "If the defendant relies on a lease, he must prove the existence (2) of that lease, its terms and provisions; and if the lease was executed by an agent, he must show the agent's authority to execute it." (2.) "A lease of Milly Smith's lands, made by F. L. Brandon, would not bind Milly Smith, unless she had empowered Brandon to make such lease." (3.) "The defendant, if he claims under a lease, must prove such lease, and its execution by a person authorized to execute it." (4.) "After the purchase by plaintiffs from Milly Smith, the defendant had no authority to clear additional land, and hold it for three years thereafter, under the lease with Milly Smith." (5.) "When Milly Smith sold to plaintiffs, then the lease to McDaniel ceased to operate further than as to that portion of the land already cleared." The court refused each of these charges, and the plaintiffs duly excepted to their refusal.

All the rulings of the court to which, as above stated, exceptions were reserved, are now assigned as error.

WALDEN & SON, and WATTS & SONS, for appellant.

McSPADDEN, CARDEN & BURNETT, *contra*.

BRICKELL, C. J.—1. In ejectment, or in the corresponding statutory real action, the plea of not guilty is an admission by the defendant that he is in possession of the premises sued for, unless he accompanies it with a statement upon the record, limiting the extent of his possession. In that event, it becomes an admission of possession only of such part of the premises as is designated in the statement.—Code of 1876, §§ 2692-3. The statute is an affirmation of the 24th rule of practice in the Circuit Courts, in reference to the consent rule in actions of
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ejectment, which was borrowed from a rule of the King's Bench.—2 Tidd's Pr. 1226; *Bernstein v. Humes*, 60 Ala. 582. It is not pleading which is contemplated, but simply a statement upon the record of the extent of the possession of the defendant, that it may be known for what part of the premises he appears and defends. The statement is sufficient—answers all the purposes for which it is intended—when with reasonable certainty it designates and describes a part, so that it is distinguished from the residue of the premises. If it be vague and uncertain, a motion should be made to strike it from the record, leaving the plea of not guilty to stand an admission of the possession of the entire premises. It is not, like pleading, subject to demurrer. The statement in the present case, to which a demurrer was interposed, is not objectionable for uncertainty or indefiniteness of description of the part of the premises of which possession is admitted. There could be no difficulty in separating that part from the residue of the premises; and the inference is just, that the plaintiffs, who are presumed to know the entire premises, were not left in doubt as to the part for which the defendant appeared to litigate with them the title, or the right of possession.

2. It is unimportant whether the Circuit Court erred or not, in refusing to permit the deed from Milly Smith to the plaintiffs to be read in evidence, without other proof of execution than the certificate of acknowledgment. The execution was afterwards sufficiently proved, and the deed read in evidence, rendering its rejection in the first instance wholly immaterial.

3. There are several objections to questions propounded to witnesses, but the bill of exceptions does not show the evidence which was elicited by them. It may be the answers consisted only of a disavowal of all knowledge touching the matters of which inquiry was made, or were wholly immaterial, or the evidence was favorable to the plaintiffs. There can not be a reversal of a judgment, because improper questions are propounded to witnesses, unless it is shown that in response to them improper evidence was elicited and admitted.

4. The bill in equity filed by the plaintiffs against the defendant, was verified by affidavit. It is true, that a bill in equity, not verified, is regarded as containing rather the suggestions of counsel, than the deliberate statements of the complainant, and is not, in a collateral suit, admissible evidence against him of the facts stated in it.—1 Brick. Dig. §29, § 353. But, when it is verified, because of the solemnity and deliberateness attached to an oath taken in the course of judicial proceedings, a different rule obtains. The bill is then treated as a statement of facts admitted by the complainant, and becomes

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evidence against him in collateral suits.—*McRea v. Ins. Bank of Columbus*, 16 Ala. 755; *McLemore v. Nuckolls*, 37 Ala. 662. The bill with explicitness avers the execution of the lease by Milly Smith to the defendant. That was a material fact, upon which the equity of the bill depended. The averment was, as against the plaintiffs, sufficient evidence of the lease, and of the authority of Brandon, as agent, to execute it.

5. The term of the lease was three years, reserving to the lessee the right to occupy for three years such parts of the premises as he reduced to cultivation each year of the term. The reservation, like a covenant for quiet enjoyment, or a covenant to cultivate the land in a particular manner, or a covenant for a renewal of the lease, runs with the land, and is binding upon the assignee of the reversion.—*Taylor's Land. & Ten.* § 262. It was, of consequence, proper to permit the defendant to prove that, in 1879, he had cleared six acres of the lands. Of it he was entitled to possession for three years, or a period extending beyond the commencement of the present suit. Nor can we perceive any objection to evidence that, before the commencement of the suit, the defendant had surrendered to the plaintiffs the possession of parts of the premises.

6. The writ of injunction was offered, for the purpose of showing that the lands of which defendant claimed to hold possession were cleared after the issue and service of the writ, and in violation of its mandate. If this be true, the violation of the injunction was a contempt of the Court of Chancery, and could in that court, while the proceedings were *in fieri*, have been punished. But, if the plaintiffs submitted to the violation, suffering the suit in equity to continue in progress, and ripen into a final decree, other courts can not inquire into it collaterally, and visit it with a forfeiture of rights the court of equity may not have been willing to impose. In that court, there are many equitable considerations involved in an application to punish a party for a violation of an injunction while the cause is *in fieri*. The motives of the party obtaining the injunction, the good or bad faith, and the conduct of the party charged with its violation, are all considered. If other courts should intervene, and determine collaterally that there has been the violation of an injunction, the consequences which are to result could not be adjusted as a court of equity would adjust them; and if the parties aggrieved do not apply to that court, they can not ask other courts to assume its jurisdiction. If the suit in equity has passed into a final decree, and the injunction been perpetuated, the court adjudging the defendant was without right to clear the lands in controversy, the decree would be admissible evidence, and conclusive. That is not, however, the question now presented.

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7. There was no conflict between the evidence of Russell on the trial in the court below, and the statements in the former affidavit introduced to impeach him. The two are reconcilable, if they are not corroborating. Impeaching statements, or statements supposed to be impeaching of a witness, are inadmissible, unless they are contradictory of a material statement made by him on the trial. When the two statements are reconcilable, the one can not be received to contradict the other.—1 Whart. Ev. § 558.

8. The plaintiffs having read in evidence a part of the answer of the defendant to the bill in equity, it was the right of the defendant to read the whole.—*Lawrence v. Ocean Ins. Co.*, 11 Johns. 269.

9. The several instructions requested by the plaintiffs touching the execution of the lease, it may be conceded, assert correct legal propositions. But it is obvious, if they had been given, without the aid of additional or explanatory instructions, the attention of the jury would have been withdrawn from the evidence of Brandon's authority to execute the lease. Instructions requested, ignoring or obscuring material evidence, or which would devolve upon the court the duty of giving additional instructions to prevent them from misleading, may be refused. The remaining instructions requested were properly refused. The sale to the plaintiffs did not, of itself, terminate the lease, nor did it terminate the right of the lessee to continue the clearing of the lands. The purchasers could have terminated the lease, and all rights of the lessee under it, by paying him a *reasonable valuation* for the unexpired term. That is the only event upon which the lease stipulated the lessee would surrender possession, if the lessor made sale of the lands during the term. Until the happening of that event, the lease continued in full force, and its covenants were binding upon the assignees of the reversion.

10. There can be no doubt of the correctness of the first, third, and fourth instructions, given at the instance of the defendant. They state simple truisms. The second instruction, it may be, is so expressed, that it had a tendency to mislead the jury. It may have conveyed to them the impression, that the plaintiffs could not recover unless, before the commencement of the suit, they had actual possession of the lands in controversy, and the defendant entered and disposed them; a proposition manifestly erroneous, and which it can not be presumed the court intended to assert. It is capable of the construction that, to maintain the action, the plaintiffs must have been seized—must have had a seizin, giving to them constructive possession, or rather drawing to it the right of immediate possession; and after the seizin, the defendant must have wrong-

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fully entered, or must have wrongfully remained in possession. Adopting this construction, the proposition asserted is, that a present right of entry and possession on the part of the plaintiffs, and a wrongful possession on the part of the defendant, must concur to support the action. The instruction is very nearly a repetition of the words of the statutory form of complaint, and was, perhaps, drawn from them. The tendency of the instruction to mislead the jury, would have justified the court below in refusing to give it. But the court having given it, if the plaintiffs apprehended injury from it, an explanatory instruction should have been requested, obviating the tendency to mislead. The tendency of instructions given to mislead, is not an error which will avail to reverse a judgment.—1 Brick. Dig. 344, § 129.

We find no error in the record, and the judgment must be affirmed.

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Bill in Equity to establish Parol Trust in Lands.

1. *Parties to bill.*—When lands are held in trust, express or implied, and the *cestui que trust* dies, the right to enforce the trust descends to all of his heirs equally, and all are necessary parties to a bill filed for that purpose.

2. *Parol trust in lands.*—Oral evidence, to overturn a trust in any case, must be clear and convincing; and can not be received (Code, § 2199) to engraft an express trust on a conveyance of lands which is absolute in its terms.

3. *Resulting trust, implied from payment of purchase-money.*—A resulting trust in lands, in favor of the person who advances the purchase-money, the title being taken in the name of another, is matter of implication only, and is easily overturned; and when the money is advanced by a husband (or father), and title taken in the name of the wife (or child), the presumption of a trust is overturned, and the presumption arises that an advancement was intended.

4. *Trust in fraud of creditors.*—When lands are conveyed by a debtor to his wife or child, with the intent to place the property beyond the reach of his creditors, and to be held in secret trust for his own benefit, neither he nor his heirs can enforce the trust.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 10th January, 1881, by Joseph B. Kelly and Fleming J. Kelly, sons of Russell J. Kelly, deceased, against Mrs. Eliza J. Karsner, who was their sister, George W. Karsner, her husband, and Mrs. Keziah W. Kelly,

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who was the widow of said Russell J. Kelly; and sought to enforce an alleged trust in a tract of land, for the equal benefit of the complainants and Mrs. Karsner, and to have the land sold for partition among them, subject to an admitted charge or lien in favor of the widow. The tract of land had belonged to said Russell J. Kelly, and was conveyed by him, by deed dated May 18th, 1866, to his wife, Mrs. Keziah W. Kelly, as her sole and separate estate. This deed, which was duly recorded, and a copy of which was made an exhibit to the bill, recited as its consideration that Mrs. Kelly had relinquished her right of dower in other lands, at the instance and request of her husband, and on his promise to convey this tract to her in consideration of such relinquishment; but the bill alleged, that this deed was executed by the said Russell J., and accepted by Mrs. Kelly, "with an understanding and agreement between them that she should hold said land in trust for the joint benefit of herself and said Russell J. Kelly." On the 8th October, 1874, Mrs. Kelly conveyed said tract of land, by deed of that date, which was duly acknowledged and recorded, and a copy of which was made an exhibit to the bill, to Mrs. Eliza W. Karsner. The consideration recited in this deed was the present payment of \$1,000; but the bill alleged, that the consideration in fact was "said Russell J. Kelly's relinquishment of his marital rights in his said wife's lands in Tennessee, and one thousand dollars to be afterwards paid to her,"—this being the charge or lien admitted by the bill; "that said deed was executed at the request of the said Russell J., for his sole benefit, and without any consideration from the said Eliza J. Karsner, and was accepted by her with the understanding and agreement that she would hold said lands in trust for the sole benefit of the said Russell J. Kelly." The bill alleged, also, that said Russell J. Kelly died, intestate, in the year 1878, "leaving his widow, said Keziah W. Kelly, and three children—namely, your orators and said Eliza W. Karsner—who were his only heirs-at-law surviving him;" and that Mrs. Karsner claimed the land as her individual property. A joint and several answer was filed by Mrs. Karsner, her husband, and Mrs. Keziah W. Kelly; denying the alleged trusts, or parol agreements, as to each of the deeds, and insisting that each was an absolute conveyance in fact, as on its face it purported to be. On final hearing, on pleadings and proof, the chancellor dismissed the bill; and his decree is now assigned as error.

CABANIS & WARD, and WALKER & SHELBY, for appellants.

(1.) The bill seeks to enforce a resulting trust in land, implied or arising from the payment of the purchase-money or consideration; and not, as the chancellor erroneously supposed, the

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execution of a parol trust, or verbal contract in relation to land. Such contract or trust, resting in parol, is expressly forbidden by the statute, and can not be enforced.—Code, § 2199; *Patton v. Beecher*, 62 Ala. 579. This statute, and this principle, apply only to the conveyance from Russell J. Kelly to his wife; as to which deed there was no resulting trust, the grantor relying solely on the verbal agreement, which he could not have enforced. But the conveyance from Mrs. Kelly to Mrs. Karsner stands on different facts: its consideration proceeded wholly from Russell J. Kelly, who dictated the terms on which the property should be held; these terms were accepted by the grantor, and the property conveyed as agreed on; and the grantee, who had no participation in the transaction, and even no knowledge of the facts at the time, afterwards accepted the deed with full knowledge of the facts, and agreed to hold the property on the terms agreed on. The trust arises from the facts—the payment of the purchase-money by one person, while the title is conveyed to another; and not from the agreement, admissions, or declarations of the parties, recognizing the trust which the law implies from the facts. The complainants rely on the implied trust, which the law raises from the facts stated and proved; and they allege and prove the declarations and admissions of the parties, in recognition of this implied trust, to rebut the presumption of a gift or advancement, which might otherwise be implied. If the law would raise a resulting trust from the facts, and would enforce that trust; on what principle can the express admissions and declarations of the parties, in recognition of that trust, impair or destroy it? That a married woman may be made or declared a trustee, and that a trust may be implied and enforced against her, in favor of her husband, on account of his payment of the purchase-money, has been expressly decided by this court.—*Harden v. Darwin & Pulley*, 66 Ala. 55. In the absence of direct proof to the contrary, a gift or advancement would be presumed; and yet, here, the effort is to make the direct proof defeat the resulting trust. A court of equity will regard that as well done, which it would compel the parties to do; and it ought, on this principle, to give effect to the admissions and declarations of parties, in recognition of a trust which it would enforce against them *in invitum*. Such a trust, as between these parties, could only be proved by their admissions and declarations.

2. No question arises, in this case, as to the rights of creditors, or the validity of the transaction as against them. The intention of Russell K. Kelly to place the property beyond the reach of supposed creditors, of which there is some evidence, is outside of any issue made by the pleadings. If the issue had been properly presented, the complainants might have shown, as the

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fact is, that he was legally discharged from the debts on which he was sued, and successfully defended the suits against him; and there could be no fraud, where there was no one to be defrauded. Besides, the consideration of his deed to Mrs. Kelly was the relinquishment of his marital rights to her lands in Tennessee, which could not be a fraud on his creditors in Alabama. And if there was any fraud intended or attempted, as between Kelly and his wife, Mrs. Karsner can not take advantage of it.—*McBlair v. Gibbs*, 17 Howard, 236; *Armstrong v. Toler*, 11 Wheaton, 253.

JNO. D. BRANDON, and W. B. WOOD, *contra*.—(1.) The bill does not seek to enforce a resulting trust, which arises by mere implication of law, but an express trust, created by the contract and agreement of the parties; and such a trust in land can not be created or established by parol evidence.—Code, § 2199; *Patton v. Beecher*, 62 Ala. 587; *Glass v. Hulbert*, 102 Mass. 24; *Hoge v. Hoge*, 1 Watts, 163; *Movan v. Hayes*, 1 John. Ch. 339; *Perry on Trusts*, §§ 79, 81; *Browne on St. Frauds*, 94; 1 Paige, 494. (2.) If such trust could be established by parol, the evidence adduced in this case is not sufficient for that purpose; the complainants' testimony being indefinite and inconsistent, and contradicted on all material points by the defendants. 1 Story's Eq. § 152; *Perry on Trusts*, § 137; *Howland v. Blake*, 97 U. S. 626; *Tilford v. Torrey*, 53 Ala. 120; *Garrett v. Garrett*, 29 Ala. 439; *Larkins v. Rhodes*, 5 Porter, 195; *Lee v. Browder*, 51 Ala. 288. (3.) If there was any secret trust, it was intended to place the property beyond the reach of Kelly's creditors; and this would be an insuperable obstacle to its enforcement.

STONE, J.—The present bill was filed by Joseph B. and Fleming J. Kelly, against Eliza J. Karsner, their sister. All the parties, complainants and defendant, are children of Russell J. Kelly, deceased. The purpose of the bill is to have a trust declared, and to obtain partition of the lands described in the bill. It is not disputed that, up to 1866, the title to the lands was in Russell J. Kelly. At that time, he conveyed the lands, upon a recited valuable consideration, to his wife, Keziah W. Kelly, to her sole and separate use. The title remained in her until 1874, when Russell J. and his wife, Keziah W., had a voluntary separation. Being about to separate, Mrs. Kelly proposed to re-convey the lands to Russell J. Kelly. He declined to have the title re-conveyed to him, and, at his instance and suggestion, they were conveyed by Mrs. Keziah W., to Eliza Karsner, who was not present, and, at that time, had no knowledge of the transaction. She testifies, she was notified of it

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by her father, within a few days after the deed was executed. This deed has a recited consideration of one thousand dollars. The bill avers that the deed from Russell J. to Keziah W. Kelly was made in trust for both the grantor and grantee; and that the deed from Keziah W. to Eliza J. Karsner was made in trust for the said Russell J.

The frame of the bill would indicate that, when it was filed, the expectation and intention were to prove that the conveyance was made to Mrs. Karsner, in express trust for her father; and the complainants bring this bill as heirs-at-law of said Russell J., claiming in his right. Whether we consider the case of complainants as resting on such alleged express trust, or as relying on the doctrine of resulting trust—namely, that Russell J. Kelly paid the consideration money which induced Mrs. Kelly to convey to Mrs. Karsner, and therefore a trust resulted by implication of law in favor of said Russell J.,—it would seem that, in either aspect, the bill is imperfect. It is shown that Mr. Kelly had other heirs; and if the lands were held in trust for him, whether by express agreement, or under legal implication, when he died, that beneficial interest descended alike to all his heirs, and all should be made parties to this suit.

All the testimony offered in proof of an express trust is oral, it not being alleged, or shown, that there was any writing declaring such trust. The testimony is as inharmonious and contradictory as can be found in the annals of judicial contestation, even since parties have been made competent witnesses in their own causes. The tendency of complainants' proof is, not that a trust was created for the benefit of the father, but that the trust was for their benefit, in common with their sister, Mrs. Karsner; and the proof on this point, even by complainants' witnesses, is not in harmony. Some witnesses state, simply, that the elder Kelly only said his sons must have more land, without specifying quantity. Defendant's witnesses testify there was no trust in either conveyance. Much of the testimony, on both sides, is mere hearsay. If such testimony were competent to establish an express trust, engrafted on an absolute conveyance of lands, we should hesitate before pronouncing complainants' proof sufficient. Oral proof, to overturn a writing, should be clear and convincing. But such proof can not be heard, to engraft an express trust on a conveyance of lands, absolute in its terms.—*Patton v. Beecher*, 62 Ala. 579. So, we must treat this case, as if the oral proof of intention had not been made.

It is contended, in the second place, that Russell J. Kelly paid a valuable consideration to Mrs. Kelly, for the conveyance she made to Mrs. Karsner, and that therefore a trust resulted to him to claim and have the title, because the valuable con-

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sideration moved from him; and such trust, at his death, descended to his heirs. If there were anything in this point, the testimony as to consideration is subject to much criticism. The testimony of Mrs. Kelly is, that only a power of attorney was given to her; and if so, that power was revocable, and was of little or no value. She also says this was an after-thought, and not the consideration of her deed to Mrs. Karsner. But we need not decide this.

The doctrine of resulting trust is one of sheer implication; and that implication may be easily overturned. If a husband or father purchase lands with his own means, and have title made to his wife or child, the presumption of a resulting trust is overturned, and the contrary presumption arises, that the purchase and conveyance were intended as an advancement for the nominal purchaser.—Perry on Trusts, §§ 143-4, and the numerous authorities cited. So, even if Russell J. Kelly paid to his wife a valuable consideration for the conveyance she made to Mrs. Karsner, his daughter, no implication of a trust arises in his favor.—*Hatton v. Landman*, 28 Ala. 127.

There is another insuperable obstacle to the relief prayed in this bill. The testimony which proves the transactions which resulted, first, in the conveyance to Mrs. Kelly, and then from her to Mrs. Karsner, shows clearly that the elder Kelly's purpose was, to place the property beyond the reach of creditors, to whom he feared he would be made liable, as surety for others. Now, no matter what consideration he may have paid to his wife, Mrs. Kelly, for the conveyance she made to Mrs. Karsner, the act of taking—intentionally taking—title in the name of his daughter, with intent thereby to delay, hinder, or defraud his creditors, disarms him of all right to recover, no matter what her agreement to hold in trust, or to re-convey, may have been. Not that such a conveyance gives her an honest right to hold, but, because of his vicious intent, he forfeits all right to recover.—*King v. Avery*, 61 Ala. 479; 3 Wait's Act. & Def. 199.

Affirmed.

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Action against Railroad Company, for Personal Injuries.

1. *Contributory negligence; standing on platform of car while in motion.* A regulation forbidding passengers to stand on the platform of a car while the train is in motion being reasonable and proper, a passenger who is injured while standing on the platform, in violation of such regulation, is guilty of contributory negligence, and can not maintain an action to recover damages for such injuries.

2. *Failure to blow whistle, or ring bell, on approaching depot or station.* The statutory provisions requiring the engineer, or other person in charge of a moving train of cars, to blow the whistle, or ring the bell, on approaching a depot or stopping-place (Code, §§ 1699, 1700), are intended for the protection of the travelling public, or persons not on the train; and passengers on the train are not, ordinarily, included in the letter or spirit of the statute, and can not complain of its violation, when suing for damages on account of personal injuries, to which the failure to ring the bell could have had no tendency to contribute; though cases may occur, possibly, in which passengers, or other persons permissively on the train, are entitled to have such signals given, as a warning to hasten their departure.

3. *Limitation of action; date and form of summons, and amendment thereof.*—The limitation of an action against a railroad company, to recover damages for personal injuries, is one year (Code, § 3231); and in determining when the action was commenced, the date or form of the summons is not conclusive, it being amendable in these particulars on proper evidence.

4. *Construction of summons; charge referring legal question to jury.* It is the duty of the court to determine whether the summons is an original or an *alias*, and a charge which refers the decision of that question to the jury is erroneous.

5. *Agent's admissions or declarations; when admissible as evidence against principal.*—The admissions or declarations of an agent are admissible as evidence against his principal, only when made in the discharge of his duties as agent, and so closely connected with the main transaction in issue as to constitute a part of the *res gestæ*.

6. *When declarations are part of res gestæ.*—In determining whether declarations fall within the principle of *res gestæ*, while it is not necessary that they should be strictly contemporaneous with the main fact in issue, they must be so nearly coincident in point of time as to grow out of that fact, to elucidate it, and to explain its character and quality, and must be so closely connected with it as to virtually constitute but one entire transaction.

7. *Declarations of conductor and engineer; when admissible against railroad company.*—In an action against a railroad company, to recover damages for personal injuries sustained by a passenger, a witness for the plaintiff can not be allowed to testify, that the conductor, "a few minutes after the plaintiff had been hurt, asked the engineer why he did not respond to the bell-call; and that the engineer answered, he did respond to all the bell-call he heard."

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APPEAL from the Circuit Court of DeKalb.

Tried before the Hon. LEROY F. BOX.

This action was brought by James M. Hawk against the appellant, a domestic corporation, to recover damages for personal injuries sustained by the plaintiff by being thrown, or falling, from the platform of a passenger car at Valley Head, to which station he had travelled as a passenger from Fort Payne, another station on the defendant's road, on the 10th December, 1879. The defendant pleaded, 1st, not guilty; 2d, "that the injuries to plaintiff now complained of, if any he received, would not have occurred without his fault or negligence, and that his fault and negligence contributed, proximately and directly, to produce said injuries, and said injuries were not the result of any wanton, reckless or intentional act done by this defendant, its agents or servants;" 3d, the statute of limitations of one year. Issue was joined on all these pleas.

The original summons was sued out on the 25th October, 1880; but its service was set aside by the court, at the next ensuing term, and leave given to the plaintiff to issue an *alias*; and another writ was issued on the 25th June, 1881, which is in form an original, and not an *alias*. On the trial, as the bill of exceptions recites, the defendant offered this last writ in evidence, as showing the commencement of the action; and objected to the admission of the former writ, when offered in evidence by the plaintiff, "on the ground that the same was illegal, irrelevant, and inadmissible under the issues joined." The court overruled this objection, and allowed the former writ to go to the jury as evidence; and also permitted the plaintiff to prove that the service of that writ had been set aside by the court, as stated, and leave granted to issue an *alias*. On this evidence, "the court charged the jury, of its own motion, that the summons and complaint dated the 25th June, 1881, was not on its face an *alias* summons and complaint, but that the jury could look to the summons and complaint dated the 25th October, 1880, to see whether that of the 25th June was an *alias*; and if the jury found that this last writ was an *alias*, then the plea of the statute of limitations was avoided." To this charge, and also to the admission of the evidence objected to, exceptions were reserved by the defendant.

The plaintiff testified as a witness for himself, and stated the circumstances under which he was injured, and he introduced two witnesses who were present at the time the accident occurred; while the engineer and the conductor of the train were examined as witnesses for the defendant. There was no conflict in the testimony of these several witnesses as to the material facts, which are stated in the opinion of the court. The defendant requested the following charges, which were in writ-

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ing: (1.) "Negligence consists either in doing what a man of ordinary intelligence, care and prudence ought not to do, and would not do, or in omitting to do what a man of ordinary intelligence, care and prudence ought to have done, and would have done; and if the plaintiff was guilty of either of these kinds of negligence, and thereby contributed, proximately and directly, to produce the injuries of which he complains in this suit, then the jury ought to find a verdict for the defendant, although they may believe that it was possible for the engineer to have stopped the train precisely at the depot, and that the engineer honestly and in good faith tried to do so, but failed on account of the wet weather." (2.) "If the plaintiff, by ordinary care, and by ordinary observance of the known rules and regulations of the defendant corporation, could and would have avoided the injuries of which he here complains; and if, by his failure to exercise such ordinary care, he contributed proximately and directly to produce the injuries of which he here complains; then, upon this state of facts, the jury ought to find a verdict for the defendant, although they may believe all the evidence as to any alleged negligence of the conductor or engineer." The court refused each of these charges, and the defendant excepted to their refusal. The refusal of these charges, and all the other rulings of the court to which exceptions were reserved, are now assigned as error.

RICE & DOBBS, for appellant.

DUNLAP & DORTCH, *contra*. (No briefs on file.)

SOMERVILLE, J.—The action here is for an injury to the person of the plaintiff, which resulted from his being accidentally thrown, or having fallen, from the platform of a passenger car of the defendant railroad company. The plaintiff charges the injury to the negligence of the defendant's servants, and the defense interposed is the negligence of the plaintiff himself, which is alleged to have proximately contributed to the injury.

It was justly observed by this court, in *Memphis and Charleston Railroad Co. v. Copeland*, 61 Ala. 376, that the doctrine of contributory negligence "is too firmly rooted in our jurisprudence to be open to further controversy." Its underlying principle is, that no man should, ordinarily, be permitted to recover for a tort or wrong to which his own want of care has directly or proximately contributed. The reason is, that if, by his failure to exercise ordinary care, he might have avoided the consequences of the defendant's negligence, the plaintiff is regarded as the author of his own wrong. It is commonly observed, that to allow the plaintiff to recover in such a case, would be to give

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him damages for the proximate consequences of his own negligence.—*Tanner v. L. & N. R. R. Co.*, 60 Ala. 621; *M. & C. R. R. Co. v. Copeland*, 61 Ala. 376, *supra*; Shearman & Redfield on Negligence, § 24; Wood's Mayne on Damages, 96; Wharton on Negligence, §§ 300–301; *Gothard v. Ala. Gr. S. R. R. Co.*, 67 Ala. 114.

There are certain qualifications of this rule, which are fully discussed in the case of *Tanner v. L. & N. R. R. Co.*, 60 Ala. 621 (*supra*), and were followed by this court in subsequent rulings; *Cook v. Central R. R. and Banking Co.*, 67 Ala. 533; *Gothard v. Ala. Gr. S. R. R. Co.*, 67 Ala. 114, *supra*. There is no evidence in this record, tending to show that the injury suffered by the plaintiff was brought about by any act of the defendant, which was wanton, reckless, or intentional. If such had been the case, the defendant would have been liable, notwithstanding the plaintiff's want of ordinary care. Nor is there any evidence tending to prove that the peril of the plaintiff was manifested to the servants of the defendant company in time to have averted the catastrophe by the exercise of preventive effort on their part. The injury occurred simultaneous with, or prior to the discovery of the plaintiff's danger. Hence, the modifications of the general doctrine of contributory negligence, as recognized in the cases last above cited, have no room for application to the case at bar.—*Price v. St. Louis R. R. Co.*, 3 Amer. & Eng. Railway Cases, 365; *Little Rock, &c. R. R. Co. v. Parkhurst*, 5 *Ib.* 635.

The facts of the present case seem clear and undisputed. The plaintiff was a passenger on the regular passenger train of the defendant company, and had paid his fare to Valley Head, an established station on the line of the Alabama Great Southern railroad. There was a down grade in approaching this depot, and the track was wet from rain; in consequence of which, the cars composing the train were carried by the engine twenty-five or thirty yards beyond the customary stopping-place. The conductor signalled the engineer to back the train to the depot, which he did, as is shown to have been usual on such occasions. The whistle had been sounded about half a mile before approaching the station; but this was not continued, nor does it appear that the bell was rung while thus approaching. It is shown to have been towards night, on the tenth day of December, 1879, and was "dark, raining, and cloudy." When the engineer sounded the whistle, as a signal of approach to Valley Head Station, or very soon after, the plaintiff, according to his own testimony, "went out of the passenger car, on to its platform, and remained there until the train, at a reduced rate of speed, passed the depot," when he was precipitated, or fell from the platform, so as to render him temporarily unconscious.

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How the accident happened, the plaintiff was unable to state. The regulations of the railroad company forbade passengers to stand on the platform while the trains are in motion. The rate of speed at which the train was moving, when it passed the depot, was from three to five miles an hour.

It is manifest that the plaintiff would not have been injured, but for his own co-operating negligence. Standing upon the platform while the train was in motion, in the dark, was a want of ordinary prudence, which contributed directly to the injury suffered. The regulation of the company forbidding this was a reasonable one, and its violation by the plaintiff was a want, on his part, of ordinary care under the circumstances. If passengers travelling on railroad trains insist upon thus exposing themselves unnecessarily to danger, they must do so at their own peril, and not at the peril of the railroad companies.—*Hickey v. Boston, &c. R. R. Co.*, 14 Allen, 429; *Quinn v. Illinois, &c. R. R. Co.*, 51 Ill. 495; *Railroad Co. v. Jones*, 95 U. S. 439.

The court erred in refusing to give the charges numbered one and two, requested by the defendant, which were but clear recognitions of the above enunciated principles.

2. Whether the engineer was *ringing a bell*, on approaching the depot, was not material. The statute, it is true, provides this signal to be given, or else for the whistle to be blown, at intervals, until the train reaches the depot, or stopping-place; also, before entering any curve crossed by a public road, on a cut where the engineer can not see at least one-fourth of a mile ahead, and upon entering into the corporate limits of any town or city.—Code, 1876, § 1697. And a railroad company is made liable for all damages done to persons, stocks, or other property, *resulting from a failure to comply with these requirements*. Code, § 1700. These precautions, so far as applicable to persons, are intended obviously for the benefit of the travelling public, and others who have a right to be warned of approaching trains, for their personal protection against injury. Passengers, who are on the trains, are not ordinarily included in the letter or spirit of the statute. They do not need such signals of warning for their protection, and they can not, therefore, be construed to be entitled to them.—*South & North Ala. R. R. Co. v. Thompson*, 62 Ala. 494; *Railroad Co. v. Bowdron*, 92 Penn. St. 475 (37 Amer. Rep. 707). The failure to ring a bell, at the time of the injury to the plaintiff, could have had no tendency to contribute to such injury. We can see no logical connection between this negligence of the defendant and the alleged damage suffered by the plaintiff. The court erred, therefore, in permitting the plaintiff to testify, that no bell was rung by the engineer as the train was approaching the depot at Valley Head, at the time of the alleged injury. It may be

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proper to add, that cases may possibly occur, where passengers, or other persons permissively on a train, are entitled to have such signals given, as a warning to hasten their departure from a train immediately before leaving a depot or stopping-place, as the statute requires to be done.—Code, § 1699; *Doss v. M. K. & T. R. R. Co.*, 59 Mo. 27; 21 Amer. Rep. 371; *Letcher v. Ga. Cent. R. R. & Bank Co.*, last term.

3-4. The present action, being a claim for damages on account of a personal injury, is governed by the statute of limitations of one year.—*M. & M. Railway Co. v. Crenshaw*, 65 Ala. 566. The date of the summons, however, was not conclusive evidence of the time of the commencement of the action. Nor was the form of the summons conclusive of its character as an *original*, or an *alias*. Even if in form an original, such process “may be amended, on proper evidence, so as to show it is in fact an *alias*.”—*Huss v. Central R. R. & Banking Co.*, 66 Ala. 472; *Steamboat Farmer v. McCraw*, 31 Ala. 659. The court erred in referring this question to the jury. It was a matter of law for its own determination. *Jones v. Pullen*, 66 Ala. 306; *Taylor v. Kelly*, 31 Ala. 59; *Price v. Mazange*, *Id.* 701.

5-7. The objection interposed to the testimony of the witness, Allison, should have been sustained. This witness was permitted to testify to the jury, that, “a few minutes after the plaintiff had been hurt, the conductor asked the engineer, *why he did not respond to the bell-call*; and the engineer answered, *that he did respond to all the bell-call he heard*.” To the admission of this evidence the defendant duly excepted.

The rule is well established, that it is not within the scope of an agent’s authority to bind his principal by admissions having reference to by-gone transactions. The only ground upon which the admissibility of an agent’s declarations can be justified, is, that they must have been made while in the discharge of his duties as agent, and be so closely connected with the main transaction in issue as to constitute a part of the *res geste*.—*Mobile & Mont. R. R. Co. v. Ashcraft*, 48 Ala. 15; *Tanner’s Ex’r v. L. & N. R. R. Co.*, 60 Ala. 621; *Robinson v. Fitchburg & W. R. R. Co.*, 7 Gray, 92; *Baldwin v. Ashley*, 54 Ala. 82; 1 Brick. Dig. p. 63, §§ 160-162.

It is difficult, if not impossible, to accurately define the principle of *res geste*, as it is often called. It is commonly said to have reference to such circumstances and declarations as are *contemporaneous* with the main fact under consideration, and so closely connected with it as to illustrate its character. 1 Greenl. Ev. § 108. What lapse of time is embraced in the word “contemporaneous,” is often a question of difficulty. Perfect coincidence of time between the declaration and the

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main fact is not, of course, required. It is enough that the two are substantially contemporaneous; they need not be literally so. The declarations must, however, be so proximate in point of time as to grow out of, elucidate, and explain the character and quality of the main fact, and must be so closely connected with it as to virtually constitute but one entire transaction, and to receive support and credit from the principal act sought to be thus elucidated and explained. The evidence offered must not have the ear-marks of a device, or afterthought, nor be merely narrative of a transaction which is really and substantially past.—Thompson on Carriers of Passengers, pp. 557, 558; *Gandy v. Humphries*, 35 Ala. 617; *Henderson v. The State*, 70 Ala. 23; *Enos v. Tuttle*, 3 Conn. 250; *Scraggs v. The State*, 8 Sm. & M. 722; *Com. v. Hackett*, 2 Allen, 136; *Luby v. Hudson R. R. Co.*, 17 N. Y. 131; Ewell's (Evans) Agency, 219-220; *McDermott v. Hannibal &c. R. R. Co.*, 73 Mo. 516; s. c. 39 Amer. Rep. 526.

In *Thompson v. Travunian* (Skinner, 402), it was ruled, "that what the wife said immediately upon the hurt received, and before she had time to devise or contrive anything for her own advantage," might be given in evidence under this principle. In *Luby v. Hudson River R. R. Co.*, 17 N. Y. 131, *supra*, the declarations of the driver of a street-car, made after an accident had occurred and the car had been stopped, but before he had left it, to the effect that he could not stop the car because the brakes were out of order, were ruled to be mere hearsay and inadmissible.

In *Adams v. Hannibal &c., R. R. Co.* (74 Mo. 553; s. c. 41 Amer. Rep. 333), the court, for a like reason, excluded the declarations of the engineer and fireman of the train, made immediately after the deceased was struck and the train was stopped, showing that the accident was occasioned by the negligence of the engineer. The case is clearly analogous to the present one, and the views of the court, after a clear and instructive review of the cases, fully accord with the conclusion reached by us, and the reason upon which that conclusion is based. Our conclusion is, that the declarations of the conductor and engineer can not, under a proper application of this principle, be regarded as a part of the *res gestæ* of the accident resulting in the injury to plaintiff. The time—"a few minutes"—does not appear to be so proximate to the main transaction, nor are the declarations made otherwise so closely connected with it, as an elucidating circumstance, as to justly authorize the conclusion that they are not merely narrative of a past occurrence, which at the moment was finished and complete.—Thompson on Carriers of Passengers, pp. 557-8; *Packet Co. v. Clough*, 20 Wall. 528, 540; *Morse v. C. R. Rail-*

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road Co., 6 Gray, 450; *Michigan, &c., R. Co. v. Carrow*, 73 Ill. 348; 1 Brick. Dig. p. 843, §§ 553-555; *Gandy v. Humphries*, 35 Ala. 617.

The judgment of the Circuit Court is reversed, and the cause remanded.

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Motion for Summary Judgment by County Superintendent of Education, against Tax-Collector and Sureties.

1. *Summary judgment; recitals of record; waiver of irregularities.* When a party resorts to a statutory and summary remedy, in derogation of common-law principles and procedure, the record must affirmatively show every fact necessary to bring the case within the statute, and a strict conformity to its requirements in the mode of procedure; but, if the defendants appear, and, without objection to the mode or form of proceeding, submit the issues to the decision of the court and jury, irregularities in the proceedings are thereby waived; and the court having jurisdiction of the subject-matter, and of the parties by their appearance, such irregularities are not available on error.

APPEAL from Circuit Court of Blount.

Tried before the Hon. LEROY F. BOX.

This was a motion by Stephen C. Allgood, as county superintendent of education of said county, against Jeremiah Ratliff, "late tax-collector of said county," and several other persons, as sureties on his official bond as such collector, "for the sum of \$482.90, with interest thereon from the 1st day of May, 1880, and twenty per-cent. damages thereon, for the failure of said Jeremiah Ratliff, tax-collector as aforesaid, to pay over to said S. C. Allgood, as such county superintendent of education, on the first day of May, 1880, or at any other time since then, all the poll-tax collected by him which it was his duty to collect, and which he could have collected by due diligence; said \$482.90 being the balance due from said Ratliff, as tax-collector, on the poll-tax fund for Blount county for the year 1879, and due for the scholastic year 1880." Notice of the motion was issued on the 16th March, 1881, and was returned by the sheriff executed on all of the defendants on the 31st March. The notice stated that the motion for a judgment would be made at the next ensuing term of the Circuit Court, to be held on the 25th April, 1881; and that Richard F. Campbell, one of the sureties on the bond, being dead, was not sued. The bond, a copy of which was attached to the notice, was dated the 10th September, 1878, approved September 13th, and recited that

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said Ratliff "was, on the 6th day of August, 1877, duly elected tax-collector for said county;" and its condition was, that the said Ratliff "shall well and truly discharge the duties of said office, while he continues therein, or discharges any of the duties thereof." The motion was duly entered on the docket on the 25th April, 1881; and on a subsequent day of the term, as the minute-entry recites, "came the parties, and by agreement of the parties it is ordered by the court that this motion be continued."

At the next term, a judgment was rendered in the cause, as follows: "On this, the 29th October, 1881, come the parties by their attorneys, and the defendants withdraw their demurrer; and issues being joined on the plaintiff's motion, as specifically entered and set forth on pages 141-2 of the Motion Docket, thereupon came a jury," &c., "who, upon their oaths, do say, 'we, the jury, find the issues in favor of the plaintiff, and assess his damages at the sum of \$370.21.' It is therefore considered by the court, that the plaintiff, Stephen C. Allgood, as county superintendent of Blount county, have and recover judgment against the defendants for the said sum of \$370.21, damages by said jury so assessed, together with the costs in this behalf expended; for which let execution issue. And the plaintiff, in open court, agrees to a stay of execution on this judgment, until the first day of January, 1882." The defendants appeal from this judgment, and here assign it as error, not specifying any particular errors.

HAMILL & DICKINSON, for appellants.—The statute (Code, § 3397) is highly penal, and must be strictly construed; and the record must affirmatively show a compliance with all of its requirements.—*Enloe v. Reicke*, 56 Ala. 500; *Caldwell v. Dunklin*, 65 Ala. 461; *Ware v. Greene*, 37 Ala. 494. It authorizes a judgment against "a tax-collector and his sureties," "a county treasurer and his sureties," and a *former* county superintendent; but not against a *late* or *former* tax-collector, as Ratliff was. Nor does it authorize a judgment against some of the sureties only, though one be dead.—*Ware v. Greene*, 37 Ala. 494; *Collier v. Powell*, 23 Ala. 579. Nor can a summary proceeding be maintained on a bond like the one here set out, which was dated and approved in September, 1878, and recites an election on 6th August, 1877; there being no averments that it was ever delivered, or that Ratliff ever acted under it. *Sprowl v. Lawrence*, 33 Ala. 674.

WATTS & SONS, and J. G. WINTER, *contra*, cited *King v. Armstrong*, 14 Ala. 295; *Rutherford v. Smith*, 27 Ala. 417; *Ex parte Wilson*, 54 Ala. 296.

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BRICKELL, C. J.—It is true, as insisted by the counsel for the appellants, that when parties pursue a statutory remedy, in its character summary, and in derogation of the mode of procedure at common law, there must be strict conformity to the statute, and the record should affirmatively disclose every fact necessary to entitle the party to the remedy—should disclose a case within the statute, and that the remedy is pursued by a party having the right, and against a party subject to it. Nor can such a remedy be extended by construction beyond the terms of the statute giving it. But, if the parties appear, and, without objection, proceed to a trial on the merits, before a court having jurisdiction of the subject-matter, all right to take advantage of the mode or form of proceeding is waived.—*Curry v. Bank*, 8 Port. 360; *Smith v. Bank*, 5 Ala. 26; *Broughton v. Robinson*, 11 Ala. 929; *King v. Armstrong*, 14 Ala. 293; *Rutherford v. Smith*, 27 Ala. 417.

The appellants, who were defendants in the court below, appeared in obedience to the notice that judgment against them would be moved for, and, without any objection to the mode or form of the proceeding, pleaded to the merits; and the issues were tried by a jury, upon whose verdict the judgment was rendered. The jurisdiction of the court, of the subject-matter of suit, is apparent, and is not disputed. The objections now interposed to the regularity of the proceedings, if of any force, the appellants voluntarily waived, and they furnish no warrant for a reversal of the judgment.

Affirmed.

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Statutory Real Action in nature of Ejectment.

1. *Waiver of homestead exemption.*—Under the statute approved March 4th, 1876 (Code, § 2848), a waiver of a right of homestead exemption is required to be made “by a separate instrument in writing;” consequently, a waiver embodied in an ordinary promissory note, though attested by one witness, is invalid and inoperative.

2. *Contest of claim of homestead exemption; where tried.*—When a homestead is allotted to the surviving child of a decedent, by commissioners appointed by the Probate Court, and the allotment is contested by a creditor, that court has no authority to try the issue (Code, §§ 2838, 2841), but should certify it to the Circuit Court for trial at the next term.

3. *Remedy of creditor to enforce waiver.*—As to what is the proper remedy of a creditor, in whose favor a valid waiver of homestead exemption has been executed by a debtor since deceased, the waiver not having

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been enforced during his life, and his estate being declared insolvent, *quare?* "Possibly legislation is called for on this subject."

4 *Homestead exemption in favor of decedent's minor child; how affected by insolvency of estate.*—Where a deceased debtor left no surviving widow, but a minor child as the only member of his family, such child had a right to occupy the homestead during minority, and, if the estate was declared insolvent during such minority, the homestead estate vested absolutely in the child, under the provisions of the act approved April 23d, 1873 (Sess. Acts, p. 64, § 15); but, if the child attained its majority before the estate was reported insolvent, the right of homestead terminated with its minority, and was not revived and enlarged into an absolute estate by the subsequent insolvency.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. WM. L. WHITLOCK.

This action was brought by William Baker, against Eliza Keith, Joseph Keith, Lewis Mallory, and Austin Caldwell, to recover the possession of a tract of land, particularly described in the complaint; and was commenced on the 7th February, 1880. The land sued for, which contained one hundred and sixty acres, belonged to one John Keith at the time of his death, which occurred on the 15th April, 1876; and each party claimed under him,—the plaintiff as a purchaser at a sale made by his administrator, under an order of the Probate Court rendered on the 12th June, 1879; and Eliza Keith, one of the defendants, claiming it as a homestead exemption, the other defendants being her tenants. Eliza Keith was a daughter of said John Keith, and was residing with him at the time of his death; she being then twenty years old, and the only member of his family. The estate of said Keith was declared insolvent by the decree of the Probate Court, on the report of the administrator, on the 1st May, 1877; but the record does not state when it was so reported by the administrator. On the same day (May 1st), a petition was filed by the administrator, alleging that said estate "has been declared insolvent," and asking the appointment of commissioners to set apart to said Eliza Keith such real and personal property as she might be entitled to; and commissioners were thereupon appointed on the same day, who made their report to the court on the 29th May, allotting to her the lands here sued for as her homestead exemption. This allotment was contested by Baker, the plaintiff in this action, "a creditor of said estate, and a claimant on a note made by said decedent waiving all exemptions, which had been duly filed as a claim against said insolvent estate." On "the trial of said contest," as the bill of exceptions recites, "the controversy being whether the said lands, so set apart to Eliza Keith, were liable to the payment of Baker's said note against John Keith; Baker insisted that said lands were liable to be sold to satisfy said note in his

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favor, in which the benefit of all exemptions was waived by the maker, and the administrator insisted that said lands were not liable to be sold to satisfy said note;" and the court thereupon decreed and declared that the lands were subject to be sold for the payment of debts. On the 26th March, 1879, the administrator filed his petition in said Probate Court, asking an order to sell the lands for the payment of debts; and the order having been granted, the plaintiff became the purchaser at the sale, as above stated. The proceedings connected with the sale, it is stated, "were shown to be in all respects regular." The several orders of the Probate Court were proved on the trial, and the plaintiff's note against said decedent was produced and proved. On all the evidence adduced, the court charged the jury, "that they should find for the defendants, if they believed all the evidence;" and this charge, to which the plaintiff excepted, is now assigned as error.

JOHN T. HEFLIN, for the appellant.

BRADFORD & BISHOP, *contra*. (No briefs on file.)

STONE, J.—On the 13th day of March, 1876, John Keith executed a note to William Baker, by which he promised to pay him \$444.52, one day after date, with interest from January 1st, 1876. The note contained this clause: "And as part of the consideration hereof, I hereby [waive] all right which I may have, under the constitution and laws of Alabama, to have any of the property of the said John Keith exempted from levy and sale under legal process." The execution of this paper by Mr. Keith was attested by a subscribing witness; and the question is made, whether this is a waiver of the homestead exemption. There can be no question, that the waiver would be sufficient, if the right depended alone on the constitution of 1875. But this note, with the attempted waiver, was executed March 13th. Nine days before that, the legislature, by act approved March 4th, 1876 (Pamph. Acts, 123; Code of 1876, § 2848), prescribed the manner in which such exemption should be evidenced. Its language is: "When such waiver relates to realty, it shall be made by a separate instrument in writing, and must be signed by both husband and wife, if the resident has a wife, and the execution of such instrument must be attested by one witness." The waiver in this case not being made "by a separate instrument in writing," it follows that it is insufficient and inoperative in all matters relating to the realty. Homestead being realty, and that being the question raised by this record, this cause must be determined as if there had been no attempt to waive the exemption.

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John Keith died, intestate, April 25th, 1876, owning and residing on the lands in controversy—one hundred and sixty acres. He left no wife surviving him, but it is not shown when his wife died. He left children, one of whom, Eliza S. Keith, was then under age. She reached her majority in July, 1876, three months and some days after her father's death. In May, 1877, after Miss Keith became of age, the estate of John Keith, her father, was declared insolvent. Baker's claim was duly presented to the administrator, within eighteen months after his appointment, and duly filed, verified as a claim against the estate, within nine months after the declaration of insolvency. The administrator filed his petition in the Probate Court, to obtain an order to sell said lands for the payment of debts; obtained the order, and sold the lands. Baker became the purchaser, and paid the purchase-money; the sale was reported to the Probate Court, and confirmed; report made that the purchase-money was paid; order granted that title be made to the purchaser, and title made to him. No question is raised here as to the regularity of the proceedings in the Probate Court, which resulted in the sale and conveyance to Baker. They appear to be regular in form. The present is a statutory real action brought by Baker, founded on the title he thus acquired.

In May, 1877, under a petition by the administrator to the Probate Court, three commissioners were appointed, who, among other things, allotted to Eliza S. Keith the lands in controversy as a homestead,—one hundred and sixty acres, valued at one thousand dollars. This allotment was reported to the Probate Court May 31st, 1877. William Baker contested the allowance of said homestead claim before the Probate Court, whereupon the probate judge ruled as follows: "After due consideration of the testimony offered in the matter of the contest as made by William Baker, a creditor of said estate, and a claimant on a note made by said deceased, waiving all exemptions it appears to the court that the real estate of which said John Keith was seized and possessed at the time of his death, is subject to administration, and to the payment of costs and expenses of administration, and the payment of debts due by said estate." In acting on these exceptions, the Probate Court erred. After the formation of the issue on the exceptions filed, that issue should have been certified by the Probate Court to the Circuit Court, to be therein tried at the next term thereof. Code of 1876, § 2841.

We have shown that the waiver in this case is invalid as to the lands. If it had conformed to the statute, in what manner could such liability be made available against the real estate of a deceased debtor? The statute has made provision for enforcing the liability, when suit is brought and prosecuted to judg-

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ment during the life of the debtor. The statute has not provided for the case, where the debtor dies before judgment. If the estate be solvent, no difficulty can arise; for there can be no need of resorting to the exempt property, for the payment of debts. But, in case of insolvency, how is the exempt property to be reached? The title even of exempt personal property does not vest in the administrator, and the statutes furnish no form of procedure for its sale. If the administrator apply for an order to sell the exempt homestead, waiving all consideration of the absence of power in the court to grant the order, he can only obtain a general order to sell for the payment of debts; counting, in such case, the proper expenses of administration, as part of the debts for which he may sell. The power and jurisdiction of the Probate Court, in this behalf, are purely statutory, and that court can exercise no power in reference to the sale of lands, or the settlement of insolvent estates, that are not conferred by statute. Assets of estates, in the hands of the administrator, are, it would seem, general assets for the payment of general debts (with the exception of certain preferred debts, prescribed by statute), and both the administrator and the Probate Court are without express power to apportion the assets between the common debts, and those containing waiver of exemptions.—*Tyson v. Brown*, 64 Ala. 244; *Steele v. Steele*, *Id.* 438; *Miller v. Irby*, 63 Ala. 477; *Calhoun v. Fletcher*, *Id.* 574. Is there an implied power in such case? Possibly, legislation is called for on this subject.

When Mr. Keith died, the exemption statute approved April 23d, 1873 (Pamph. Acts, 64), governed the question of Miss Keith's homestead. It is contended for appellee that, under section 3 of that statute, the real estate in controversy is absolutely exempt from the payment of debts. Its language is, "That the homestead of a family . . . of any resident of this State, after his death, shall be exempt from the payment of debts; *Provided*, such decedent leaves surviving him a widow or child." In *Thompson v. Thompson*, 51 Ala. 493, the language above copied was construed by this court. It was there held that, to come within the statute, the child left surviving must be under twenty-one years of age. We concur in this construction, and think that sections 12, 14, 15 of the statute demonstrate that our predecessors were right in their view. The particular contention in this case is, that by the operation of said section 3, the homestead became exempt from the payment of debts, but not from the law of descents, unless the estate proved insolvent, when the surviving widow or minor children, one or both as the case might be, would take in fee. *Thompson v. Thompson*, *supra*, is relied on in support of this view. The question in that case arose on personal property.

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The principle decided was, that in case the estate was solvent, and left a balance for distribution, then the exempt personal property should be accounted for in hotchpot, in final distribution. That was expressly provided for in section 13 of the act. The statute, in terms, and absolutely, exempts the personal property enumerated from the payment of debts, in all cases where there is a surviving widow or minor child. The only account afterwards taken of it is, that in case the estate proves solvent, and a distribution is made, such exempt personal property becomes, and is estimated as, so much advanced to those who receive it, and to be accounted for as an advancement. The rule as to the homestead is different. The right of the widow and minor children is, *prima facie*, not a fee. It is only during the life of the widow, and the minority of the children. All else belongs to the estate, unless there is an insolvency. This residuum of title, or reversion, is as much property of the estate, as is the reversion after the determination of an estate in dower.

It is contended for the appellee, that because Mr. Keith's estate was insolvent, the exemption of the homestead, which otherwise would have continued only during the minority of Miss Keith, became thereby enlarged into a fee. Section 15 of the act of 1873 reads as follows: "That the homestead exempted for the benefit of the widow and minor child or children under this act, may be retained by such wife, or by such child or children, until it is ascertained whether the estate is solvent or insolvent; and if the estate is insolvent, shall vest in them absolutely. If the estate is solvent, the homestead shall be held, considered and treated as a part of the real estate of the decedent, without reference to this act." It will be observed, that this right to retain has for its subject the homestead exempted for the benefit of the widow and minor child or children. We can not think the legislature intended by this to enlarge the minor's *mere right to occupy*, beyond the period of minority. The purpose, we think, was, that this right to occupy, which, in the event the estate is solvent, determines when the occupant becomes twenty-one, shall be enlarged to an absolute title, in the event the estate proves insolvent. The purpose was to enlarge an existing estate or interest, not to create a new one, after the first had terminated. The estate in the present case, on the basis that the estate was solvent, was a right to occupy three months and eight days. That was the estate the statute provided for the enlargement of. At the time of its termination, July 23d, we are not informed the estate was insolvent. It may not have been insolvent. Destruction of property, depreciation in stocks or other securities, failures of debtors, and many possible events or casualties, may render estates insolvent, which were amply solvent at the time of decedent's death. So,

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on the other hand, estates apparently insolvent, have been shown to be solvent, by a failure to establish claims against them. We think we do full justice to the claimant of homestead, when we hold, as we do, that an estate can not be regarded as insolvent, until it is so pronounced by judicial determination; and when so pronounced, it may relate back to the time of filing the report of insolvency, but certainly can extend back no farther. So, we hold, that the enlargement of the temporary right to occupy, into a fee, can not take place, unless the report of insolvency is made before the termination of the right to so occupy. It is only in such case that there is any right or interest to be enlarged by the happening of the insolvency. When the limited or qualified right expires before the insolvency supervenes, there is no estate left to be enlarged. Possibly, there might be cases of collusion, or fraud, which would work an exception to this rule; but this case requires no decision of that question.

The reasonableness of this interpretation will be much more manifest, when we inquire, what would be the result of the opposite view. The same language is employed, and in the same sentence, to define the rights of the minor child, and of the surviving wife. The words must receive the same construction in the one case as in the other. If we hold that, in the case of a minor child, the possession of the homestead is to be retained by such minor until it is ascertained whether the estate is solvent or insolvent, and this notwithstanding such minor may reach his or her majority long before the fact of solvency *vel non* is, or can be ascertained, how can this principle be made applicable to the widow? Her right to occupy the homestead continues, in all cases, during her life. How can that mere right to occupy be prolonged, so as to cover an additional period, while the question of the solvency of the estate may remain in doubt? Suppose she dies before that fact is ascertained; who is there to occupy during the doubtful period? And if she die while the estate is considered solvent, and, by some unforeseen event or disaster, it becomes necessary to have it declared insolvent, does a new right of homestead, overleaping the chasm, spring up in her heir at law? Such, it would seem, would be some of the consequences of holding that the right of the minor to occupy the homestead is prolonged beyond the period of minority, that it may be ascertained whether the estate is solvent or insolvent; or, the statute means one thing when applied to minors, and an entirely different thing when applied to the widow. We know of no canon which will authorize such interpretation. The chief policy of maintaining the right of homestead exemption after the death of the owner, is that the widow and minor child or children, in consideration

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of their presumed helplessness, may have shelter and means of support. The constitution guarantees these, and the legislature is powerless to take them away. Any thing beyond them is mere legislative bounty. We find nothing to justify its extension in the present case. Miss Keith's homestead right did not extend beyond the time she attained her majority.

There being in this case no valid homestead exemption, the error of the judge of the Probate Court in himself setting aside the allotment, without referring it to the Circuit Court, worked no injury. And there being no homestead exemption in the way, the Probate Court had authority to grant the order of sale. The probate proceedings being regular, and title made to Baker, the purchaser, he established his right to recover the premises sued for. The Circuit Court erred in the charge given. It should have been in favor of the plaintiff.

Reversed and remanded.

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Contest of Widow's Claim of Homestead Exemption.

1. *Claim of homestead exemption, and contest thereof; where tried.* Under statutory provisions (Code, §§ 2838, 2841), the Probate Court, or the judge of probate, has no jurisdiction to try any contest as to the right of homestead exemption, but is required to certify the issue to the Circuit Court for trial, whether it arise on an allotment made by commissioners, or on an application made to the court under circumstances which dispense with the necessity for the appointment of commissioners.

2. *Exceptions to widow's claim; when filed.*—A contest of the widow's claim to a homestead exemption can only be originated, in the Probate Court, by the filing of written exceptions to the allowance of the claim, or of the allotment, as the case may be; which must be filed, when made to the allotment, within "thirty days after the expiration of the sixty days" allowed them for making their allotment and report; and within thirty days, when the claim is made by petition under circumstances which render the appointment and report of commissioners unnecessary, all the facts being presented by the pleadings.

3. *Same.*—If exceptions are not filed within the prescribed time, the court has no power to allow them to be filed afterwards; and an order of continuance, though made by consent, and stated in a subsequent entry to have been made "without prejudice," does not enlarge the time within which exceptions may be filed.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

In the matter of the petition of Mrs. Margaret Riordon, widow of John Riordon, deceased, selecting certain lots in the

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city of Mobile, of which her husband died seized and possessed, and praying that the same might be set apart to her as a homestead, "free and exempt from all the debts of the said John Riordon." The petition was filed on the 19th November, 1878, and alleged that said John Riordon died, intestate, on the 10th September, 1878, leaving no children; that he occupied as his homestead, at the time of his death, two of the lots, which were particularly described, and which did not exceed \$500 in value; and that the third lot, also particularly described, "is immediately adjoining and contiguous to said lots first above described, and is of the value of not more than \$100, or \$500; and petitioner therefore selects as her homestead the whole of said real estate, being of less value than \$2,000, and prays that the same may be set apart to her as her homestead," &c. On the filing of this petition, the Probate Court appointed the 23d November for the hearing, and ordered notice of the application to be given to the administrator, Owen Farley. On the 23d November, as the minute-entry of that date recites, "the hearing of questions incidental to the application of Margaret Riordon for the exemption allowed by law having been set down for hearing this day, came the attorneys of the applicant and administrator, and request the court to continue the proceedings; and it is so ordered." On the 12th January, 1880, a petition was filed by the administrator, asking an order to sell the real estate for the payment of debts; and on the same day an order was entered on the minutes, that the hearing of the widow's petition "be set down for the 15th inst." On the 15th January, an order was entered in the matter of said petition, in these words: "Continued by agreement of counsel, under leave of the court."

The following orders were afterwards entered in the matter of the petition, at the dates specified: February 25th, 1880: "Came the parties, and upon filing of demurrer by defendant, the cause was continued to the 30th inst." March 31st, 1880: "Came Margaret Riordon, widow of John Riordon, in person and by attorney; and came also Owen Farley, the administrator of the estate of said deceased, in person and by attorney, and asks the court to consider and pass upon the application of said Margaret for the whole of the real estate of said decedent to be exempted to her as her homestead, on the ground that said lands are of value less than \$2,000; and the hearing of the cause having been continued without prejudice, as can be seen by reference to decree of continuance of November 23d, 1878, the court proceeds to hear counsel on said application. Thereupon, counsel for contestant demurs to said petition, as follows," setting out the demurrer; "and the court having overruled said demurrer, counsel for contestant thereupon submits

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exceptions to said claim of exemption, as follows," setting them out: "which said exceptions counsel for the petitioner moves to strike from the files, because the same were not filed within the time prescribed by law. Said motion to strike from the files was denied by the court, as said cause had been continued by agreement, and without prejudice, as shown by the foregoing orders of the court; to which ruling counsel for the petitioner excepted. Motion was then made by the counsel for the petitioner, to certify to the Circuit Court of the county the issue made up on the exceptions filed to the petition; which motion was denied by the court, as no allotment of the homestead had as yet been made (Code, § 2841); to which action of the court the petitioner excepted. Thereupon, came the attorneys for petitioner, and say that the proceedings in this cause ought to abate, because the Probate Court has no jurisdiction to hear and determine the issue formed on exceptions to the allotment of a homestead. The court overruled this motion, and the petitioner excepted." The trial then proceeded, and, on the evidence adduced, the court gave Mrs. Riordon an election to take either of the two houses and lots as her homestead; but she declined to make an election between them, and sued out an appeal to the Circuit Court; and that court, on errors assigned, reversed the decree of the Probate Court, and remanded the cause to that court for further proceedings; holding that the exceptions were filed too late, and that they ought to have been stricken out on motion. The administrator appeals from this judgment, and here assigns it as error.

OVERALL & BESTOR, for appellant.

G. L. SMITH, *contra*.

SOMERVILLE, J.—Under the provisions of the present Code (1876), the Probate Courts of this State have no jurisdiction to try any controversy touching the right of exemption to real estate claimed as a homestead. This want of jurisdiction extends to all cases where the question is raised, whether the allotment has already been made and reported by commissioners, after they have made the selection and valuation, or whether the controversy arise on application made directly to the court under such circumstances as to authorize the appointment of commissioners to be dispensed with, as unnecessary to the ascertainment of the requisite facts. The language of the statute is, "*In no case shall the trial of the right of homestead be had before a judge of probate, or justice of the peace.*" Code, § 2838. In all litigated cases, therefore, where such a

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contest is properly raised, the issue formed is required to be certified by the probate judge to the Circuit Court of the county, to be tried therein at the next term thereof; after which, the judgment of the Circuit Court shall be certified back to the Probate Court for further proceedings."—Code, §§ 2841, 2838; *Kelly v. Garrett*, 67 Ala. 304; *Baker v. Keith*, at present term.

The Code prescribes the only manner in which such a contest can be originated in the Probate Court. This can be done by the personal representative of the decedent, or any person in adverse interest, and must be by the *filing of written exceptions* to the allowance of the claim, or to the allotment of the homestead, as the case may be.—Code, § 2841. The time is also prescribed, within which these exceptions shall be filed and the contest thus initiated. When the claim is made through the appointment of sworn commissioners, it becomes their duty to make the selection and valuation, and report the same to the Probate Court within sixty days after their appointment; and the exceptions are required to be filed "within *thirty days* after the expiration of said sixty days."—Code, § 2841; Acts 1876-7, § 24, p. 42. This method of contest is made applicable to all cases, "when homestead or exemption is claimed by the widow, or guardian of the minors" (Code, § 2841); and a natural and reasonable construction of the statute is, where no report of commissioners is required, the facts being all presented by the pleadings, the administrator is allowed *thirty days* within which to file his exceptions to the allowance of the claim made in the petition. The clause having reference to the "sixty days," seems to have no field for operation, except in those cases where commissioners are appointed, and it becomes their duty to make a report.

The petition of the appellee, claiming and selecting her exemption in a right of homestead as widow of the decedent, was filed in November, 1878, and is fully shown by the record to have been brought at once to the attention of the appellant, as administrator. No exceptions were filed by the contestant, until March, 1880, considerably more than a year after the petition was filed. We are of opinion, that they were properly ordered to be stricken from the files by the Circuit Court, under these circumstances. The Probate Court had no power to authorize the issue to be made up after the lapse of the period of time fixed by statute. It is a question of jurisdiction, and not of mere pleading. The filing of the exceptions was a condition precedent to the exercise of the jurisdiction, and without it no issue could be formed, or contest raised by the appellant; unless, perhaps, by demurrer, in certain cases not necessary to be considered.

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The difficulty under consideration is not obviated by the continuance of the appellee's petition, and proceedings thereunder. The order of continuance, though made at the request of both parties, did not operate as an extension of the time allowed for filing the exceptions. It was made only four days after the petition was filed, and there remained ample time within which the issue required by statute could have been formed. The recital by the probate judge, in an order made more than a year afterwards, to the effect that the continuance was made "without prejudice," does not change its legal effect, in the absence of any evidence of an express agreement of counsel touching the question.—*Collier v. Falk*, 66 Ala. 223.

The action of the Circuit Court is without error, and its judgment is affirmed.

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Bill in Equity for Divorce, on account of Abandonment.

1. *Proof of residence.*—By express statutory provision (Code, § 2691), a divorce can not be granted on the ground of voluntary abandonment, unless it is alleged and proved that the party applying for it, whether husband or wife, has been a *bona fide* resident of this State for three years next before the filing of the bill; and the statute being intended to guard against frauds on the jurisdiction of the court, while the fact of such residence may, like any other fact, be proved by circumstances, the court will not act upon proof of circumstances which are not in themselves conclusive, when it is apparent that the fact, if it exists, can be established by direct and indisputable evidence.

APPEAL from the Chancery Court of Blount.

Heard before the Hon. THOMAS COBBS.

The bill in this case was filed on the 15th February, 1882, by David A. Hendricks, and sought a divorce from his wife, on the ground of voluntary abandonment for more than two years before the filing of the bill. On final hearing, on pleadings and proof, the chancellor dismissed the bill, on the ground that the complainant had failed to prove his residence *bona fide* in the State for the three years next before the filing of the bill; and the chancellor's decree is now assigned as error.

HAMILL & DICKINSON, and L. R. HANNA, for appellant.

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BRICKELL, C. J.—We concur in the decree of the chancellor. The statute, in express terms, prohibits the filing a bill for divorce upon the ground of voluntary abandonment, unless it is alleged and proved, that, for three years next before the filing of the bill, the complainant has been *bona fide* a resident of this State.—Code of 1876, § 2691. The obvious purpose of the statute is the prohibition of divorces by the jurisdiction having authority to decree them, to those who, it is possible, may have transiently and temporarily transferred their residence to this State, or who, after the abandonment has occurred, may have transferred their actual domicile from this to another State—the prevention of frauds upon the law, by a temporary residence raised for the purpose of giving jurisdiction to the court. It is true, it is shown by the evidence that the marriage occurred in this State, more than thirty years before the bill was filed, and that, at different times thereafter, husband and wife were residing in the State; and there is an absence of evidence that there was at any time a change of the domicile of either. The *bona fide* residence which the statute requires may, like any other fact, be proved by circumstances; but the circumstances should be strong, in themselves conclusive, and inconsistent with any other reasonable hypothesis, than the existence of the fact. In a suit for divorce, the interests of society, as well as the interests of the parties, are involved; and as to a material fact, the court should not proceed upon evidence which is consistent with the non-existence of the fact; especially, when it is, as in the present case, manifest that, if the fact really exists, the party complaining has the means, and has had the opportunity, of proving it directly and indisputably. The complainant was a witness in his own behalf, and knew the locality of his residence during the three years next preceding the bill, and every fact showing that it was *bona fide*. There are other witnesses who knew the fact, and yet neither he nor they were examined directly in reference to it. The court can feel but little security in acting upon inconclusive circumstances and presumptions, in the presence of the fact, that there was more satisfactory evidence, which would remove all just doubt, the party had the ability and opportunity to produce. A door for collusive divorces, against which the statutes have with caution interposed guards, would be opened, of which the wary and unscrupulous would not fail to take advantage.

Let the decree be affirmed.

Lanier v. Richardson.*Application for Mandamus to Probate Judge, in matter of Entry of Judgment on Verdict Establishing Will.*

1. *Entry of judgment or decree by Probate Court; when properly made and dated.*—A decree of the Probate Court, rendered on the final settlement of an estate, usually embraces the findings of the court on both law and fact, and, like a decree in chancery, can not be known until it is officially announced by the judge; and it should bear date and take effect as of the time of said official announcement. But, when the probate of a will is contested, and an issue of *devisavit vel non* is submitted to a jury, who find in favor of the will, the judgment necessarily follows the verdict, as in an action at law; and the verdict being rendered on Saturday morning, while the court is in session, the judgment is properly entered and dated as of that day, although the entry was not actually made until ten o'clock at night, after the expiration of office hours.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. H. C. SPEAKE.

In this case, as the record shows, a petition was filed with the clerk of said court, on the 19th June, 1882, by Laura P. A. Lanier and others, containing the following allegations and prayer: "Your petitioners represent, that on the 13th September, 1881, Mrs. Martha T. Russell filed in the Probate Court of said county her petition for the probate of a paper writing, purporting to be the last will and testament of Missouri W. McCalley, deceased. As heirs at law of the said Missouri, your petitioners were, with others, made parties to said petition; and afterwards, on the 7th October, 1881, filed in said court their written specifications of objection and contest to the probate of said will. Thereupon, an issue was joined pursuant to law, and said cause was tried by a jury in said court; and said jury returned a verdict, sustaining said will. The jury brought in their verdict on Saturday morning, March 4th, 1882; and the court received said verdict on said Saturday morning, discharged the jury, and adjourned, without setting a day to enter a judgment or decree on said verdict. On Saturday night, March 4th, 1882, between the hours of eight and ten o'clock, the court entered the judgment or decree on said verdict. The regular business or office hours of said court are from nine o'clock A. M., to four o'clock P. M., as prescribed by statute. No notice of the entry of said decree was given to contestants, or to their counsel; and no notice was given to them of the time when said de-

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cree would be entered. When said decree was so entered, neither said contestants nor their counsel were present. Your petitioners allege, that the entry of said judgment or decree, so made as aforesaid on Saturday night, March 4th, 1882, was *extra-judicial*, null and void; and that said entry could not legally have been made sooner than Monday, March 6th, 1882. The premises considered, your petitioners pray for a peremptory writ of *mandamus*, directed to Hon. WILLIAM RICHARDSON, probate judge of said county, commanding and requiring him, as such judge, to annul and cancel the entry so made by him on the night of March 4th, 1882, and, in lieu thereof, to enter said judgment or decree as of Monday, March 6th, 1882."

On the hearing of the application, with the evidence adduced for and against it (which it is not necessary to state, since this court decides the case on the allegations of the petition alone), the Circuit Court refused to award a *mandamus* as prayed; and this judgment is now assigned as error.

WALKER & SHELBY, for appellants.

CABANISS & WARD, *contra*.

STONE, J.—When this case was first presented to us, we were inclined to believe the judgment should have borne date on the Monday succeeding the Saturday morning on which the verdict was rendered. The ground of that first impression was, that the judgment establishing the will was entered on the minutes of the court after office hours on Saturday, being in fact so entered between eight and ten o'clock, Saturday night. We had then recently decided the case of *Pinney v. Williams*, at the last term (69 Ala. 311), which was an attempt to compel, by *mandamus*, a change of the date of a decree of the Probate Court. Speaking of the duty of the probate judge in such case, we then said: "It clearly seems to be true, that every such decree ought to be dated when it is filed in the office as a paper in the cause, and not before or after; and that the dating of such decree is a mere ministerial act, as distinguished from the judicial act of its rendition, and the discretionary power of determining its terms, conditions, or contents. These propositions we are strongly inclined to favor; but, as they are not necessarily before us for our consideration, we do not undertake to decide them." The decree, in that case, was rendered on a final settlement of an estate; and such decrees usually embrace the findings of the court, both on law and facts. Their principles, or terms, can not be known, until they are proclaimed or recorded by the presiding judge. They resemble the decrees of a chancellor, and remain in the breast of the judge, unknown and sub-

[Lanier v. Richardson.]

ject to change, until their official announcement. There is an eminent fitness in holding that such decrees take effect, and should date, from the time they are uttered, or made known. Till then, they are not decrees, and there is no means of ascertaining what they will be. Parties can not be expected to take action in reference to such decrees, until they are pronounced; and till then, time should not be computed.

As we have intimated above, the present is a case of contested will. The will of M. W. McCalley had been propounded for probate, and objections in writing had also been filed, resisting its probate and establishment. Thereupon, an issue *devisavit vel non* was made up, and submitted to a jury. Either party had the right to claim a jury trial.—Code of 1876, § 2317. We must presume this right was claimed, as the court, in the absence of such claim, would not have awarded it. Such jury trials are governed by the same rules as those which obtain in courts of law.—*Ib.* § 2326. When the jury returned their verdict, in favor of the will, the judgment of the court establishing it was a matter of course, unless the verdict was set aside, and a new trial granted.—*Ib.* § 2329. In this, the analogy between it and a suit at law is perfect. When the verdict was rendered in this case, sustaining the will, the contestants were as fully informed what the judgment would be, as they were when the minute-entry was written up. Of course, we intend this remark to apply only when there is no ground for arresting the judgment. The judgment entered is but the logical conclusion, resulting from the premises ascertained by the verdict. In practice, the judgment on verdict is rarely, if ever, announced by the court. It follows so naturally and necessarily, that it is taken for granted. Its first actual utterance is in the reading of the minutes, the work of the clerk. The judgment, no matter when written up, is considered and treated as given on the day of verdict is rendered. Such is the rule in trials at common law; and we think the same rule must be observed in this case. In what we have said, we have considered only the averments of the petition. It presents no case for relief.

Affirmed.

[Alexander v. Pollock & Co.]

Alexander v. Pollock & Co.*Garnishment on Judgment.*

78	137
102	652
72	137
111	537
72	137
124	414

1. *What demands may be reached by garnishment.*—The principle is well settled, that only such debts, or money demands, can be reached by garnishment, as the defendant himself might recover by action of debt, or *indebitatus assumpsit*, in his own name; and when the defendant has no such cause of action, the plaintiff in the process can assert no better right, unless he can show some fraud or collusion, by which his legal rights are prejudiced.

2. *Same.*—Where the garnishees answer, that the defendant is in their employ as a clerk, at an agreed compensation of \$25 per week, payable in advance, and so paid at the beginning of each week, each party reserving the privilege of terminating the contract at any time without cause, there is no liability which can be reached by the garnishment; and the fact that this contract was made, on the service of the garnishment, with the intent, on the part of the debtor, to defeat the garnishment proceedings, does not render the garnishees liable, when it does not appear that they participated in his fraudulent intent, and he refused to continue in their employment under the former contract between them, by which his wages were payable monthly in advance.

APPEAL from the City Court of Mobile.

Tried before the Hon. O. J. SEMMES.

The appellant in this case obtained a judgment in said City Court, during its April term, 1881, against Lawrence McGetrick, for \$683.10; and sued out a garnishment against J. Pollock & Co., a mercantile partnership, as the debtors of said McGetrick, which was served on them on the 26th May, 1881. One of the garnishees appeared, and answered in the name of the partnership; alleging that they were not indebted to said McGetrick, either at the service of the garnishment, or at the time of filing their answer, and would not be indebted to him at any future time, by virtue of any contract existing between them; but stating, also, that McGetrick was in their employment, at the time of the service of the garnishment, "by the month, he having the right to quit at the end of any month, and they having the right to discharge him at the end of any month, without cause;" and that on the 1st June, 1881, they made a contract with said McGetrick, by the terms of which they "were to pay him \$25 per week for his services, in advance, which has been done, each party having the right to terminate the contract at any time." The answer was filed on the 5th July, 1881, and was not contested; but the garnishees were required,

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on motion of the plaintiff, to answer orally in open court, and they so answered during the July term of the court, 1882. The following are the material portions of the oral answer: "Pollock & Co. have paid said McGetrick his wages regularly, since the service of said garnishment, according to contract made with him on 1st June, 1881. He has never been discharged, but has been constantly in our employment since the service of the garnishment. The original agreement of employment, under which he was working when the garnishment was served, was dissolved on the 31st May, 1881; and we then agreed to pay him \$25 per week in advance for his services. The contract was put in writing on that day, and we then paid him for one week's services in advance, before the work was performed; and we have paid him his salary, under that contract, up to the present time, and now owe him nothing. Said contract of June 1st was made with the intention of defeating this garnishment, as he refused to work unless such a contract was entered into."

The written contract, which was produced, and signed by both parties, was in these words: "Whereas L. McGetrick has heretofore been employed by J. Pollock & Co. as a salesman, by the month, with the privilege of quitting said business at any time at the end of any month; and whereas, on the 31st May, 1881, he did notify said J. Pollock & Co. that he would not continue any longer as salesman for them, which was assented to by them; and whereas, on this 1st June, 1881, it is agreed by and between said McGetrick and J. Pollock & Co. that they employ said McGetrick, from this day, by the week, and are to pay him, in advance, the sum of \$25 per week; which sum of money, for one week from this date, has been paid. And it is further agreed by and between the said parties, that said McGetrick is at liberty to quit said employment at the end of any week, and the said Pollock & Co. may discharge him at any time they think proper to do so."

This being all the evidence, the court discharged the garnishees; to which ruling and judgment the plaintiff duly excepted, and he now assigns it as error.

ANDERSON & BOND, for appellant, contended that the contract between the garnishees and McGetrick was not, in legal effect, a contract for his employment only one week, or from week to week, but contemplated a continuous and permanent employment, for at least one year; that this was the practical construction which the parties themselves had placed on the contract; that the admitted "fraudulent intent" in the making of the contract showed it was a mere device or subterfuge which the law would not sanction; and that the garnishees, not

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being discharged until the final judgment in their favor, were liable for the moneys paid by them to McGetrick in the meantime, to the amount due on the plaintiff's judgment. They cited Story on Contracts, 3d ed., § 962; 3 T. R. 76; 2 T. R. 453; 3 Car. & P. 609; *Railroad Co. v. Whitney*, 39 Ala. 468; *Leslie v. Merrill*, 58 Ala. 322; Drake on Attachments, §§ 587, 606; 7 Barn. & Cr. 562; 8 Dow. & Ry. 336; *Camp v. Clark*, 14 Vermont, 387; *Bibb v. Smith*, 1 Dana, 580; *Greene v. Doughty*, 6 N. H. 572; *Enos v. Tuttle*, 3 Conn. 27; *Price v. Bradford*, 4 La. 35.

FAITH & CLOUD, *contra*.—There never was a debt due from the garnishees to McGetrick, for which he could have maintained an action of debt, or *indebitatus assumpsit*, against them; and this is the test of the garnishee's liability.—*Roby v. Labruzan*, 21 Ala. 60; *Powell v. Sammons & Dotes*, 31 Ala. 552; *Nesbitt v. Ware*, 30 Ala. 68; *Hall v. Magee & Reid*, 27 Ala. 414; *Lightfoot v. Rupert*, 38 Ala. 666. The answer of the garnishees denied any indebtedness, and it was not contested; and this, of itself, entitled them to a discharge. But a creditor, even when his claim has been reduced to judgment, has no lien or claim on the future wages or earnings of his debtor; and there is no statute, nor any principle of public policy, which forbids that the debtor should require payment in advance for any labor he may perform, or any personal services he may render. The payment of honest debts is a duty, which the law recognizes and enforces; but the support and maintenance of his family by the debtor is a duty of at least equal obligation, and is enjoined by the highest principles of civil as well as natural law.

SOMERVILLE, J.—It has long been, and is now, the settled doctrine in this State, that only such moneyed demands can be subjected to garnishment, as the defendant can in his own name recover in an action of debt, or *indebitatus assumpsit*.—*Jones' Adm'r v. Crews*, 64 Ala. 368; 1 Brick. Dig. p. 175, § 314.

It is obviously true, that an attaching or garnishing creditor can not, through the levy of his process, acquire any higher or better rights to the debt or assets attached, than the defendant had when the garnishment or attachment was served; unless he can show some fraud or collusion, by which his just and legal rights are prejudiced.—Drake on Attach. § 223.

The application of these principles proves fatal to the appellant's right of recovery. The contract between Pollock & Co., the garnishees, and the defendant, McGetrick, was, that the defendant would serve them as a salesman, in their business, upon the following terms and conditions: They were to pay

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him twenty-five dollars per week *in advance*, so long as he might continue in their employment. Each party had the right to terminate the contract at any time, the garnishees reserving the right to discharge McGetrick within their discretion, with or without cause, and he having the like privilege of abandoning their employment whenever he saw fit. It is shown that he continued in the employment of the garnishees, under this arrangement, for more than a year; during which period of time they punctually paid him his weekly wages of twenty-five dollars in advance; and they answered that they owed nothing at the time of the trial. The court discharged the garnishees, on motion; and it is insisted that this was error.

The test of the correctness of the ruling is simple. Could the defendant, under the contract, have recovered anything from his employers, Pollock & Co., at any time within the period covered by the garnishment proceedings? Could he have ever successfully sued Pollock & Co. in debt, or *indebitatus assumpsit*? It is manifest that he could not. The contract was for no definite time. Either party had the right to annul or abandon it at any time. The contract price of each week's labor was paid in advance. Suppose the defendant had gone, at the beginning of business hours on any Monday morning, and tendered his services, at the same time demanding his week's wages in advance; the garnishees might have *refused to pay*, and it would constitute no *breach of the contract*; because it could, at most, be construed only as a refusal to employ, and this right they possessed. The power of discharge at any time would necessarily involve the power to refuse doing anything which would operate as a continuance of the employee in service. No action could possibly lie on such an alleged breach. So, it is equally clear, that no action would lie by the defendant, McGetrick, for the services of any given week, after he had been paid for such services in advance. The plea of payment would be a full defense.

We can not see that the garnishees should be held liable, because the defendant was induced, of his own volition, to abandon the first contract of employment at the end of the month of May, and entered into a new one with intention to defeat the garnishment proceedings. What would have been the effect, if the garnishees had aided, or participated in the design, by voluntary collusion, we need not decide; for it appears that the defendant refused to continue the duties of his employment, unless the new arrangement was made. He had a right to dissolve the original contract, at the end of any month, by its express terms; and this he did, without the advice, encouragement, or collusion of his employers, so far as the record discloses. *Teeter v. Williams*, 3 B. Mon. (Ky.) 562, was a case

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strikingly similar to this in principle. The court held the new arrangement valid, although appearing to have been made for the purpose of protecting the defendant's subsequent earnings from being subjected by the attachment.

It is true that the statute only exempts the sum of twenty-five dollars per month of the wages, salary, or compensation of laborers, or employees for personal service, and all sums above this are liable to garnishment.—Code of 1876, § 2823. But the sum garnished must appear to have been actually due at the time of making the answer, or else that it will become due in the future by a valid contract then existing.—Code, § 3269; *Jones v. Crews*, 64 Ala. 368. If the proceeds of a debtor's labor are invested in property, not exempt, it would, of course, be liable to execution.—*Patterson v. Campbell*, 9 Ala. 933. So, it is plain, that he can not make an assignment of his future earnings, accruing under an existing contract, for the purpose of preventing them from being subjected by garnishment, or trustee process.—*Gragg v. Martin*, 12 Allen (Mass.), 498. But, at the same time, creditors have no power to compel a debtor to complete his contract for personal labor or services; and it has been held, that if he labor without compensation, or give his labor away to another, his creditors can not charge the donee who receives the benefit.—*Hoot v. Sorrel*, 11 Ala. 386; *Hodges v. Cobb*, 8 Rich. (S. C.) 50. The law has great regard for the high moral duty resting upon the debtor, to provide a maintenance and support for both himself and family, at least to the extent of necessary wants; and it may often be the case, that his only resource available for this purpose must be the wages of his labor. Hence, conclusions of fraud will not be too readily drawn, in construing contracts made to effectuate this purpose.—Bump on Fraud. Conv. (2d Ed.) pp. 244-45; *Leslie v. Joyner*, 2 Head (Tenn.), 514; *Hall v. Magee*, 27 Ala. 414.

The contract in question being free from legal objection as rightfully made, its terms and conditions can not be interfered with, interrupted, or changed in any manner, through operation of the garnishment proceedings. This is not the scope or function of such process. In the absence of fraud, it can act only on the legal rights of the defendant, as they exist under, and are fixed by his contract with the garnishees.—*Drake on Attach.* § 594; *Swisher v. Fitch*, 1 Sm. & Marsh. 541; *White v. Richardson*, 12 New Hamp. 93; *Hall v. Magee*, 27 Ala. 414.

The judgment of the City Court must be affirmed.

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*Action for Money Had and Received, under Common and
Special Counts.*

1. *Assignment of promissory note by separate writing.*—As between the assignor and assignee, a valid assignment of a promissory note may be made by a separate instrument of writing, without indorsement or delivery of the note, and without notice to the maker; and an antecedent debt, or existing liability, is a sufficient consideration to support such assignment.

2. *Same; when note is held by adverse claimant.*—Such an assignment, transferring the entire interest in the note, is not contrary to public policy, nor void for maintenance or champerty, because the note is at the time in the hands of a third person, claiming adversely to the assignor, or as collateral security for a debt due from him; but, until notice of the assignment is given to the maker and holder, all dealings between them and the assignor in reference to the note, if made in good faith, and for valuable consideration, will be protected.

3. *When action lies for money had and received.*—An action for money had and received is an equitable remedy, and lies whenever the defendant has received money which in good conscience he ought not to retain, and which, *ex equo et bono*, belongs to the plaintiff.

4. *Embezzlement and larceny; at common law, and by statute.*—At common law, embezzlement was a mere breach of trust, and not an indictable offense, unless the act amounted to larceny; and the statutes in reference to embezzlement by clerks, agents, &c. (Code, §§ 4377, '83, '84), embrace some acts which were larceny at common law, as well as acts which were mere breaches of trust.

5. *Disqualification of witness by conviction of infamous offense.*—A conviction of the common-law offense of larceny renders a person incompetent as a witness; but a conviction of the statutory offense of embezzlement does not have that effect, unless the particular act would have been larceny at common law.

6. *Same; presumption in favor of judgment.*—When objection is made to the competency of a witness, on account of a conviction of embezzlement, and the objection is sustained by the court below, this court will indulge the presumption, unless the record repels it, that the act would have been larceny at common law.

7. *Depositions of convicts in penitentiary.*—The statutory provisions regulating the taking of the depositions of convicts in the penitentiary (Code, §§ 4613-14), has no reference to their competency, but leaves that to be determined by the general law.

8. *Objection to competency of witness; when made, or waived.*—Cross-examining, without objection, a witness whose deposition is taken, is a waiver of objection to his competency; but, when there is no cross-examination, or filing of cross-interrogatories, the objection may be made at any time before the trial is begun.

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Tried before the Hon. O. J. SEMMES.

This action was brought by Wiley C. Tunstall, against the appellant, a domestic corporation; and was commenced on the 18th May, 1878. The complaint contained the common count for money had and received, and two special counts, each averring the circumstances under which the money sued for was collected and received by the defendant. There were demurrers to the special counts, assigning specially several causes of demurrer; which were overruled by the court, and which it is not necessary to state, since the same questions were raised by the charges asked and refused, after stated; and the demurrers being overruled, the general issue was pleaded to all of the counts.

Before entering on the trial, the plaintiff moved to suppress the deposition of C. A. Lathrop, a convict in the penitentiary, which had been taken on interrogatories filed by the defendant. The ground of the motion was, "that said Lathrop, before the taking of his said deposition, had been tried and convicted, in said City Court, of and for the crime of embezzlement, and sentenced to imprisonment in the penitentiary, and was confined in the penitentiary under his said sentence when his deposition was taken, and was therefore incompetent as a witness." "It was admitted," the bill of exceptions recites, "that said Lathrop was so convicted, sentenced, and confined; but they insisted that this did not render him incompetent as a witness, and that the objection was raised too late, as the plaintiff had due notice, when the interrogatories were filed and served, that said Lathrop was then a convict in the penitentiary." The court sustained the motion, and suppressed the deposition; to which an exception was duly reserved by the defendant.

The money sued for, amounting to somewhat less than one thousand dollars, was the proceeds of a promissory note executed by one S. T. Prince, or the money realized by the defendant from the sale of certain bonds which Prince had transferred and delivered in compromise and settlement of his note. The plaintiff claimed the note under a written transfer by one D. T. Webster, made in the name of D. T. Webster & Co., which was dated Mobile, January 17, 1877, and in these words: "I transfer to W. C. Tunstall a promissory note on S. T. Prince for about three thousand dollars, payable to D. T. Webster & Co., or Webster & Wilson; which note is in the hands of the Planters' and Merchants' Insurance Company, and which they will please deliver to said Tunstall on demand. The above transfer is made as collateral security for an indebtedness due to the said W. C. Tunstall." The note of Prince was payable to Webster & Wilson, who were commission-merchants in Mo-

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bile in 1873, or to their successor, D. T. Webster, who continued their business under the name of D. T. Webster & Co.; and it was acquired by the defendant under the following circumstances: Tunstall, the plaintiff, was a planter, residing in the country, and having dealings with said firms in Mobile, who made advances to him from time to time, and sold his crops; and he was indebted to them, at the time of the change of the firm, in a large amount, for which they held his two promissory notes of \$4,000 each; one of which notes was transferred by Webster to the defendant insurance company, as collateral security for money loaned to him by the company. On a settlement or statement of accounts between plaintiff and Webster, in the summer of 1874, plaintiff being found indebted in the amount of about \$7,000, and desiring additional advances to the amount of \$1,000 or \$1,500, executed several new notes, aggregating the whole amount, and delivered them to Webster, on the latter's promise to forward the old notes on his return to Mobile; but, instead of doing this, he used the new notes also, as he had used the old notes for which they were to be substituted, by transferring them as collateral security to several of his creditors. Plaintiff demanding the return of his old notes, Webster went to the president of the defendant insurance company, and offered to substitute the note on Prince for the \$4,000 note of plaintiff which the company then held; but the president, declaring that he had no authority to make the substitution, offered to submit the proposal to the proper committee, and Webster left the note of Prince with him for that purpose. The proposal was submitted to the committee, and was rejected by them; but the note of Prince was not returned to Webster, being left with the officers of the company, or retained by them; and they afterwards claimed to hold it as collateral security for Webster's indebtedness. Plaintiff was afterwards sued on his note for \$4,000 held by the defendant, and settled the debt by compromise; and Webster, while that suit was pending, transferred to him the said note of Prince, as shown by the written transfer, telling him that the defendant had no right to hold it. A written demand for the note was made by plaintiff on defendant, on the 3d November, 1877; to which the defendant replied, that the note had been settled and surrendered, with the consent and approval of Webster, on the 27th March, 1877.

On these facts, the defendant requested the following charges, which were in writing:

"1. If the jury find from the evidence that, before and at the time when the note of Prince to Webster & Wilson was delivered by Webster to the defendant, said note was past due; and that said Webster was then indebted to the defendant in

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an amount exceeding the amount of said note; and that Webster afterwards demanded said note of the defendant, and the defendant refused to deliver it to him, claiming a right to hold it adversely to said Webster, as collateral security for the payment of Webster's said indebtedness; and that afterwards, while said note was in the possession of, and held by defendant, said Webster assigned said note to plaintiff by the separate written instrument read in evidence, without the knowledge or consent of the defendant, then the plaintiff had no right to recover of the defendant, in this action, money afterwards collected by the defendant on said note.

"2. If the jury find from the evidence that, at the time of the said assignment of Prince's note by said Webster to plaintiff, said note was past-due, and was not then in the possession of said Webster, but was in the possession of the defendant, claiming a right to hold it as collateral security for the payment of a large indebtedness then and now due from said Webster; and that said assignment to the plaintiff was not made for any valuable consideration then given therefor, but only as indemnity for any loss to which plaintiff might be subjected by reason of notes which he had given to said Webster, or to Webster & Wilson; and if the jury further find that the defendant afterwards, before it had any notice or knowledge of said assignment to plaintiff, did, with the knowledge and consent of said Webster, compromise and settle said note of Prince, by receiving in satisfaction thereof certain bonds, which were afterwards sold, and the proceeds of sale applied, *pro tanto*, to the payment of Webster's indebtedness to the defendant; and if they further find that it is not shown by the evidence that the defendant, before or at the time of such settlement, compromise and application of proceeds, had any notice or knowledge of said assignment to plaintiff, then plaintiff has no right to recover of the defendant, in this action, the amount of said note, or the proceeds of said compromise and settlement, and the jury should find for the defendant.

"3. If the jury find from the evidence that the assignment of Prince's said note was made by said Webster to plaintiff by the written assignment given in evidence, and was made after the maturity of said note, and for the purpose expressed in said assignment; said assignment gave to the plaintiff a right of action on said note against said Prince, but no right of action thereon against the defendant; and if they further find from the evidence that, at the time of said assignment, plaintiff knew that said note was in the defendant's possession, and further find that the defendant, with the knowledge and consent of said Webster, afterwards compromised said note with said Prince, and applied the proceeds of said compromise and

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settlement to the payment, *pro tanto*, of an indebtedness of said Webster to the defendant; and that such compromise, settlement and application of proceeds was made by the defendant before it had any notice or knowledge of said assignment to the plaintiff, the burden of proving such prior notice or knowledge is on the plaintiff, and without such proof the plaintiff is not entitled to recover of the defendant, in this action, the proceeds of said compromise and settlement.

"4. If the jury find from the evidence that the said assignment of the note by Webster to plaintiff was made after the maturity of the note, and that plaintiff then knew that said note was at that time in the defendant's possession; and they further find that afterwards, before the defendant had notice of such assignment, said defendant did, with the knowledge and consent of said Webster, compromise and settle said note with said Prince, and apply the proceeds of such settlement to the part payment of said Webster's indebtedness to the defendant, such action and consent of said Webster did authorize the defendant to make such compromise, settlement, and application of proceeds, whether the defendant had, or had not, previously, wrongfully acquired or withheld said note from Webster, and the plaintiff is not entitled, in this action, to recover of the defendant the proceeds of such compromise."

The court refused each of these charges, and the defendant excepted to their refusal; and their refusal is now assigned as error, together with the overruling of the demurrers to the complaint, and the several rulings on the evidence to which exceptions were reserved.

WM. G. JONES, and OVERALL & BESTOR, for appellant.—(1.) The defendant came lawfully into the possession of the Prince note, long before any attempted assignment of said note to Tunstall, and had no notice of any such assignment until long after the note had been compromised and settled, with the consent of Webster, and the money had been applied in partial satisfaction of Webster's debt to the defendant. An assignment of a chose in action is not complete, until notice to the debtor; and when made assignable by statute, the assignment may be good without notice, but only when accompanied by actual delivery.—*Hobson v. Stevenson*, 1 Cooper, 205; *Gayoso Savings Institute v. Fellows*, 6 Coldw. Tenn. 467-73; *Palmer v. Merrill*, 6 Cush. Mass. 282-86; *Blackman v. Lehman, Durr & Co.*, 63 Ala. 550. (2.) Plaintiff's own negligence enabled Webster to perpetrate this fraud, by which either he or defendant must lose; and as between them, the loss must fall on plaintiff.—*Young & Son v. Lehman, Durr & Co.*, 63 Ala. 519. (3.) The deposition of Lathrop ought not to have been

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suppressed. At common law, embezzlement was not a criminal offense; and the common-law rule, as to the competency of witnesses convicted of infamous offenses, is unchanged by statute in this particular.—*Harrison v. The State*, 55 Ala. 239; *Taylor v. The State*, 62 Ala. 164. The manner of taking the depositions of convicts in the penitentiary is prescribed by the statute (Code, §§ 4613-14), which was strictly followed; and depositions thus taken are made competent evidence. (4.) If the witness was incompetent, the objection to the deposition came too late. *Gray's Executors v. Brown*, 22 Ala. 262; 1 Greenl. Ev. § 421.

G. L. SMITH, *contra*.—(1.) A promissory note, not payable at a bank or banking house, is not commercial paper, and may be assigned like any other evidence of debt, or like a chattel. *Lampkin v. Phillips*, 9 Porter, 98; *Hall & Saunders v. P. & M. Bank*, 6 Ala. 761; *Gookin v. Richardson*, 11 Ala. 889. If payable at a bank, it loses its commercial qualities when past due, and may then be assigned like any other *chose*, or like a chattel; and it is no objection to its assignment, that it is at the time held by a wrongdoer, or by virtue of a tort.—*Hinton v. Nelson*, 13 Ala. 226; *Brown v. Lipscomb*, 9 Porter, 472. (2.) The action is not founded on the note, but to recover its proceeds as money had and received. The action is an equitable one, and lies whenever the defendant has money which, in equity and good conscience, belongs to the plaintiff.—1 Brick. Digest, 140, § 72; 9 Porter, 98; 6 Ala. 716; 11 Ala. 889. The defendant was without right to the note, acquiring and holding it merely as a wrongdoer; and was neither entitled to notice of the assignment, nor injured by the want of it.—*East v. Pace*, 57 Ala. 521; *Folmar v. Brantley*, 57 Ala. 588. (3.) Lathrop was disqualified as a witness by his conviction of embezzlement. *Taylor v. The State*, 62 Ala. 164. The objection to the deposition was made at the earliest opportunity, and did not come too late. No notice was given of the filing of the interrogatories, and there was no cross-examination.

BRICKELL, C. J.—The demurrers to the complaint, and the instructions requested and refused, embrace the same questions: 1. Whether the assignment of a promissory note by a separate instrument in writing, though founded on a valuable consideration, is complete, passing to the assignee the equitable title to the note, before its delivery, or without notice to the maker? 2. If, at the time of the assignment, the note is held and claimed adversely to the assignor, is not the assignment void asavoring of champerty or maintenance?

The general principles governing the assignment of choses in action, and the rights passing to the assignee, seem to be well

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and definitely settled. The doctrine of the common law was, originally, that to a stranger they were incapable of transfer, for the same reason that things lying in entry or re-entry could not be granted. The doctrine never prevailed in courts of equity; and in courts of law it was gradually modified, until such assignments were recognized, and, though in the name of the assignor the assignee may have been compelled to pursue legal remedies, the court protected him against any unconscientious conduct of the assignor,—against his acts or admissions subsequent to the assignment. It was said by a learned judge, “that if an assignee of a chose in action have an equity, that equity shall be no exile to the courts of common law.”—*Edwards on Notes & Bills*, 53; *Lamkin v. Phillips*, 9 Porter, 98; *Chisholm v. Newton*, 1 Ala. 371; *Brown v. Foster*, 4 *Ib.* 382; *Vickers v. Mooney*, 6 *Ib.* 99. The assignment did not pass the legal title to the note. That was incapable of transfer, otherwise than by an indorsement, and delivery of the note. Before the present statute, if the assignee had been compelled to sue the maker, or any other party to the note, and the assignment passes an equity, the suit must have been prosecuted in the name of the assignor, in whom the legal title resided. Under the statute, the suit must have been prosecuted in the name of the assignee, having the equitable or beneficial interest.—Code of 1876, § 2890.

Though the assignment was not operative to pass the legal title to the note, if founded on a valuable consideration, it would create a right and equity which a court of equity would compel the assignor, and all claiming under him with notice, to carry into effect, upon the same principles, and for the same reasons, on which the execution or performance of other contracts would be compelled. The form of the assignment is not important. “Any words, in fact, are sufficient, which show an intention of transferring or appropriating the chose in action to or for the use of the assignee.” Any thing which shows, on the one side, the intention to assign, and from which the assent of the other to receive may be inferred, if there is a valuable consideration, in the contemplation of a court of equity will operate as an assignment.—3 Lead. Cases Eq. 357; 2 Story’s Eq. § 1047. “Every such assignment” says Judge STORY, “is considered, in a court of equity, as in its nature amounting to a declaration of trust, and to an agreement to permit the assignee to make use of the name of the assignor, in order to recover the debt, or to reduce the property to possession.”—2 Story’s Eq. § 1040.

The sufficiency of the consideration for the assignment—the security of an antecedent debt, or indemnity for an existing liability for which the assignor was primarily liable—is not questioned. If the consideration for an assignment be valuable, it is not necessary that it should be contemporaneous, or executory.

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An antecedent debt, or a pre-existing obligation or duty, as between the assignor and assignee, is sufficient; "for an existing obligation is a sufficient cause for every transaction, tending directly or indirectly to its fulfillment."—3 Lead. Cases Eq. 368. In its terms, the assignment is unequivocal, denoting plainly the intention to pass to the assignee dominion and control over the note.

The assignment being in its terms unequivocal, transferring by appropriate words the note and all control over it, and having a valuable consideration to support it, creating a trust a court of equity would enforce, was irrevocable by any rightful act of the assignor. As between the assignor and the assignee, no other or further act was necessary to its completion, or to its validity.—*Wood v. Partridge*, 11 Mass. 488; *Muir v. Schenck*, 3 Hill (N. Y.) 228.

In order that third persons—the maker, or any other party to the note, or the holder, whether he be the bailee or the agent of the assignor; or, as in this case is claimed, having possession and claiming adversely to the assignor—may be bound or affected by the assignment, notice of it ought to have been given them; and not being informed of facts which ought to have put them on inquiry, all dealings they had with the assignor, in good faith, and upon a valuable consideration, would be protected. If the assignee desired to protect himself against such dealings,—if a conversion of the assignment into a complete title *in rem*, and not merely a right perfect as against the assignor, had been invoked by the assignee—notice thereof was necessary. But, if he was willing to trust the good faith of the assignor—if he was satisfied that he would not take advantage of the want of notice to enter into dealings and transactions with any party to the note, or with the holder—notice was not necessary. Without notice, without a delivery of the note, as against the assignor, the assignment was complete.—*Dearle v. Hall*, 3 Russell, 1, cited in 3 Lead. Cases Eq. 320-21; *Wood v. Partridge*, *supra*. There is some diversity of opinion, whether subsequent purchasers or assignees, not having notice, would be protected against the prior equity of the assignee. This case does not involve the rights of any subsequent assignee or purchaser, or of any dealings with the assignor subsequent to the assignment.

The assignment does not contravene public policy, because at the time it was made the appellant had possession of the note, claiming to hold it as collateral security for debts due from the assignor. The assignment was of the entire interest in the note, and there was in it no element of champerty or maintenance. It is the settled doctrine of a court of equity, that assignments of the whole interest in a contract or other security, when not

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savoring of maintenance or champerty, even though at the time of the assignment they are the subjects of pending suits, will be supported.—2 Story's Eq. §§ 1051-55. Whether the appellant had any just claim to the note as collateral security for debts of the assignor, is a question which we presume was properly submitted to the jury. However this may be, the case is now presented as if it were a false clamor. The money received by the appellant in satisfaction of the note, was the money of the appellee, in whom the equitable title to the note resided. An action for money had and received is an equitable remedy, and may be supported, when the defendant has received money which, in good conscience, he ought not to retain, and which, *ex æquo et bono*, belongs to the plaintiff.—1 Brick. Dig. §§ 140, 572.

The only remaining question, of any importance, is the competency of Lathrop as a witness; and we have had much difficulty in reaching a satisfactory solution of it. Embezzlement, at the common law, unless it amounted to larceny, was a mere breach of trust, and not indictable. As it is defined, described and punished under our statutes, it embraces acts which at common law were mere breaches of trust, and other acts which were larceny. These are all visited with the same punishment as larceny; the grade of the offense, and the severity of punishment, depending upon the value of the goods embezzled.—Code, §§ 4377-79, '81, '83, '84. The section of the Code, under which it is probable Lathrop was convicted, is section 4377, declaring that "any officer, agent or clerk of any incorporated company, or clerk, agent, servant or apprentice of any private person or persons, who embezzles, or fraudulently converts to his own use, or fraudulently secretes with intent to convert to his own use, any money or property which has come into his possession by virtue of his employment, must be punished, on conviction, as if he had stolen it." It is obvious, under this statute, a conviction could be had, though the money or property was in the constructive possession of the company, or of the employer, the clerk, servant, or agent, &c., having the bare charge and oversight. And it is certain that, if he had only a bare charge and oversight, the company or employer having the constructive possession, and fraudulently converted the goods to his own use, he was guilty of larceny at common law, and upon conviction he would have been rendered infamous, and disqualified as a witness in any case, civil or criminal. —*Taylor v. State*, 62 Ala. 164; *Sylvester v. State*, at present term.

We are not informed by the bill of exceptions whether the conviction of Lathrop was for acts which at the common law were mere breaches of trusts, or for acts which would have constituted larceny. It may be, that if a statute declares criminal acts which at common law were civil wrongs only, a con-

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viction of them, though punished as felonies, would not render the person convicted infamous, and disqualify him as a witness. *Harrison v. State*, 55 Ala. 239. But a conviction of acts which were at common law of the nature of the *crimen falsi*, and punished, though under a statute which merely changes their denomination, must be followed by the same incidents which would have followed at common law, unless these are qualified by the statute.—Bish. Stat. Crimes, § 139. We can not indulge the presumption, to place the City Court in error, that the conviction of Lathrop was of acts which at the common law were breaches of trust and not larceny. That presumption must be indulged, before we could pronounce that he was a competent witness.

The statutes which authorize the taking of the depositions of persons confined in the penitentiary, has no reference to, and was not intended to enlarge their competency as witnesses. The only purpose it was intended to accomplish, was to provide a mode by which the evidence of such persons, when competent witnesses, could be obtained speedily. It would be a little singular, if a person convicted of an infamous offense was rendered competent, while under the conviction he was suffering punishment, and incompetent so soon as he had endured the punishment to its utmost.

A party cross-examining without objection a witness whose deposition is taken, is deemed to waive all objections to the competency of the witness. But if he does not cross-examine, it is sufficient if the objection is made before entering on the trial.

Affirmed.

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Bill in Equity by Creditor to set aside Conveyance of Lands as Fraudulent and Voluntary.

1. *Contents of transcript.*—The court criticises the manner in which the transcript in this case is made out, condemning the repetition of the record of a chancery suit twice copied, and declaring "there never was any occasion for making the opinion of this court in that case a part of the record."

2. *Levy of attachment on land; death of defendant before judgment.* When an attachment is levied on lands, the death of the defendant before judgment dissolves the attachment, and destroys the lien; and though the action is revived against the administrator, and judgment recovered against him, the lands can not be sold under execution issued on it.

72	151
98	99
93	336
93	498
79	151
94	409
79	151
99	643
72	151
109	152
101	630
72	151
141	626

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3. *Amendment of bill; takes effect when.*—An amendment which introduces no new subject, but only makes more specific the charges of the original bill, takes effect as of the day on which the original bill was filed.

4. *Validity of conveyance assailed for fraud; burden of proof as to consideration.*—When a creditor attacks a conveyance on the ground of fraud, but does not deny or impeach the consideration as recited, he must aver and prove that the grantee had notice of the alleged fraudulent intent of the grantor, or participated in it; but, if he denies the consideration as recited, and alleges that the conveyance was in fact voluntary, the *onus* is on the grantee, as against antecedent creditors, to prove a valuable consideration sufficient to uphold it; and when the parties are near relatives, and the conveyance was executed while a suit was pending to subject the lands to the payment of the complainant's debt, the grantee must make it plainly appear, to the satisfaction of the court, that it was a real contract of sale, upon a real and sufficient consideration.

5. *Adverse possession; what is, and how proved.*—To constitute a right by adverse holding, under the statute of limitations, there must be an actual possession, open and notorious: proof of a recorded deed, executed more than two years before the commencement of the suit, is not sufficient, without proof of possession taken and held under it.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. N. S. GRAHAM.

The original bill in this case was filed on the 12th January, 1878, by Thomas J. McClellan, as a judgment creditor of Mrs. Sarah Lipscomb, deceased, or her estate, against John T. Lipscomb as her administrator, and also individually, and against the children and heirs-at-law of Mrs. Caroline W. Lipscomb, deceased, who was the wife of said John T. and the daughter-in-law of the said Sarah; and sought to set aside, on the ground of fraud, and as a cloud on the complainant's title, a conveyance of lands executed by Mrs. Sarah to Mrs. Caroline W. Lipscomb, and to subject the lands to sale for the satisfaction of the complainant's judgment. The said conveyance, a copy of which was made an exhibit to the bill, was dated November 23d, 1867, and was filed for record on 28th March, 1868; recited the payment of \$2,000 as its consideration, and conveyed the lands to "the said Caroline W. Lipscomb and her heirs," who were also thus described as parties of the second part. The complainant's debt was evidenced by two bonds, or promissory notes under seal, each dated March 2d, 1860, and payable twelve months after date; each being signed by Sarah Lipscomb, John T. Lipscomb, and T. G. Lipscomb, as joint makers, or obligors. On October 2d, 1867, the complainant commenced a suit on these bonds, by attachment, against Mrs. Sarah Lipscomb alone; and the attachment was levied on the said lands afterwards conveyed to Mrs. Caroline Lipscomb. Mrs. Lipscomb died pending the suit, and it was thereupon revived against her administrator, but not against her heirs; and the complainant recovered a judgment against the administrator, on May 20th, 1872, for \$2,476.90, besides costs. An execution

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was issued on this judgment, and was levied on the same lands on which the attachment had been levied; and at the sheriff's sale under this levy, on March 3d, 1873, the plaintiff became the purchaser of the lands, at the price of \$2,000, and received a deed from the sheriff. The plaintiff then brought an action at law to recover the possession of the lands, but was defeated; this court holding, on appeal, that the lien of the attachment was destroyed by the death of the defendant before judgment, and that the plaintiff acquired no title by his purchase at the sheriff's sale.—*McClellan v. Lipscomb*, 56 Ala. 255.

The bill alleged the creation and existence of the complainant's debt, the issue and levy of the attachment, with all the proceedings had in that suit, and the execution of the conveyance to Mrs. Caroline Lipscomb; and it also contained the following allegations: (*Par. 6.*) "Your orator further represents, that the levy of said attachment upon said lands, at his suit, created a lien in his favor upon the same for the satisfaction of his said debt, which afterwards passed into judgment; and that said lien is now subsisting and valid, and is superior to all subsequent conveyances or incumbrances whatever." (*Par. 7.*) "That the said deed, executed by Sarah Lipscomb to Caroline Lipscomb, after the levy of said attachment, was and is fraudulent and void, and said pretended conveyance was made for the purpose of hindering and delaying the creditors of said Sarah generally, and your orator specially, from and in the collection of their just debts against the said Sarah; that said deed was made after the levy of said attachment, and, should the lien of said attachment be declared and enforced, constitutes a cloud upon your orator's title to said land." (*Par. 8.*) "That the estate of the said Sarah Lipscomb is insolvent, and said land is the only property out of which your orator stands any chance to make his said debt; that said land is, and has been all the while, in the possession of said defendants, who are and have been using and enjoying the rents and profits thereof; and that the value of said land, which is certainly not more than \$2,050 at the highest calculation, is greatly disproportioned to the amount of your orator's debt, which now amounts to nearly \$3,500." The prayer of the bill was, "that the said deed made by Sarah to Caroline Lipscomb be declared fraudulent, null and void; that your orator's lien upon said land be declared and enforced; that said land be decreed to be sold for the payment and satisfaction of your orator's judgment; and for such other and further relief as the equity of his case demands."

A joint answer to the bill was filed by John T. Lipscomb, individually and as administrator, and Richard Lipscomb, who were the only adult defendants; admitting the execution of the conveyance by Sarah to Caroline Lipscomb, but denying that

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it was fraudulent in fact or in law, and alleging that it was founded on a valuable consideration as recited, being a debt due from Mrs. Sarah to Mrs. Caroline Lipscomb for the hire of slaves, the amount due being ascertained on a settlement had between Mrs. Sarah and John T. Lipscomb, acting as trustee for his wife. They alleged that the complainant's purchase of the lands at the sheriff's sale had never been set aside, and pleaded the conclusiveness of a judgment at law refusing to set it aside on his motion. They alleged that Mrs. Caroline Lipscomb, "immediately after the execution and delivery of said deed, entered upon said land, and took exclusive possession thereof, and received the rents and profits thereof, during her life; and after her death these defendants took exclusive possession thereof, and have received the rents and profits thereof;" and pleaded their adverse possession for more than ten years, as a bar under the statute of limitations. They also demurred to the bill, for want of equity, and because the complainant's remedy, if any he had, was at law. A formal answer was filed for the infant defendants, by their guardian *ad litem*.

An amendment of the bill was filed on the 1st February, 1879, by adding a paragraph, numbered 7½, as follows: "Complainant alleges that said deed of Sarah Lipscomb to Caroline Lipscomb was without consideration. Said deed recites a consideration of \$2,000. Complainant [averts] that the vendee in said deed did not pay the said vendor said two thousand [dollars], or any other sum, but that said deed was wholly voluntary; and complainant further alleges, that said Caroline Lipscomb received said deed knowing that said Sarah made and executed the same to hinder, delay and defraud her creditors, and especially your orator; and that it was agreed and understood between said Sarah and said Caroline that said Caroline would hold said real estate in secret trust for said Sarah." By another amendment of the bill, filed on the 9th July, 1879, the 8th paragraph of the original bill was stricken out, and it was alleged that John T. Lipscomb and the sureties on his official bond as administrator were insolvent; that there were no assets belonging to the estate of Sarah Lipscomb, and the land conveyed by the deed was the only property out of which the complainant could collect his debt; that Mrs. Caroline Lipscomb died intestate, leaving no personal property; that the defendants were her only heirs at law and the distributees of her estate, and that no administration had been granted on her estate. The prayer of the amended bill was in these words: "Complainant further prays, that this his bill be taken in a double aspect, and that, on final hearing hereof, the lien of said attachment be declared and enforced, in favor of complainant, on this land; or that the conveyance from said Sarah to said Caroline Lipscomb

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be declared fraudulent and void, and said land be subjected to the payment of complainant's said debt."

An answer to this amended bill was filed by John T. and Richard Lipscomb, on the 5th August, 1879 (the same day on which their answer to the original bill was filed), admitting that Mrs. Caroline Lipscomb left no personal estate, but alleging that she had a claim against Mrs. Sarah Lipscomb, "before the war, for the hire of negroes and money collected, amounting to nearly \$2,000, which was a part of the consideration of said deed;" pleading the statute of limitations of ten years, and demurring to the amended bill because it was inconsistent with the original bill, and because it made a new and different case.

On the 10th January, 1881, the bill was again amended, by leave of the court in term time, by striking out the averment as to the insolvency of John T. Lipscomb and the sureties on his bond as administrator, and alleging the insufficiency of the bond; and this amendment further alleged, that the existence of the deed from Mrs. Sarah to Mrs. Caroline Lipscomb "was totally unknown to complainant till more than six months after the date thereof; that said Sarah held possession and control of said land until her death; that neither said Caroline, nor any one for her, took possession or control of said land until long after the death of the said Sarah;" and that said John T. Lipscomb was one of the makers of the notes or bonds held by the complainant, and had been insolvent since the close of the war. A joint answer was filed to this amendment, by "John T. Lipscomb *et al.*," denying the allegation of his insolvency, but admitting the other allegations, and again demurring for inconsistency and repugnancy.

On the same day (January 10th, 1881), the cause was submitted for decree, "on the pleadings and evidence, to be noted by the register, and depositions to be taken within sixty days." On the 21st February, 1881, an amended answer was filed by John T. and Richard Lipscomb, which is marked by the register "Allowed March 7th, 1881;" and in which they alleged, that the consideration of the conveyance to Mrs. Caroline Lipscomb was a debt due to John T. Lipscomb from his mother, Mrs. Sarah Lipscomb, for the price of land belonging to the estate of his deceased father, which she had bought but had not paid for, and that the conveyance was made to his wife at his instance and request.

The chancellor held, that, although the death of Mrs. Lipscomb, before the rendition of judgment in the attachment suit, destroyed the lien of the attachment, and the complainant acquired no title by his purchase at the sheriff's sale, yet his bill might be maintained as a creditor's bill to set aside a fraudulent

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conveyance, he being a judgment creditor of Mrs. Sarah Lipscomb's estate, and a simple-contract creditor of John T. Lipscomb; that the consideration of the conveyance to Mrs. Caroline Lipscomb, as alleged in the answers of the defendants, original and amended, was not proved, and the deed must be regarded as voluntary, and therefore fraudulent and void as against the complainant; and that the complainant, having acquired no title by his purchase at the sheriff's sale, was not bound to credit his debt with the amount of his bid. He therefore rendered a decree, overruling the demurrers to the bills, original and amended, and the plea of the statute of limitations; declaring the deed a voluntary conveyance, and setting it aside, in favor of the complainant, as a simple-contract creditor of John T. Lipscomb; ordering a reference to the register, to ascertain the amount due on the complainant's debt, and a sale of the land in satisfaction thereof, unless the amount should be previously paid into court by some one of the defendants.

The appeal is sued out by all of the defendants, and errors are assigned by all jointly, and also by John T. Lipscomb separately; the assignments of error, eighteen in number, embracing the overruling of the demurrers to the bill, the overruling of the plea of the statute of limitations, and the final decree.

THOS. H. WATTS, and L. P. WALKER, for appellants.—(1) The lien of the attachment, created by the levy, was destroyed by the death of the defendant before judgment.—*McClellan v. Lipscomb*, 56 Ala. 255; *Phillips v. Ash*, 63 Ala. 414. The statutory lien being thus defeated and destroyed, it could not be revived and enforced by a court of equity.—*Junney v. Buell*, 55 Ala. 408; *O'Conner v. Chamberlain*, 59 Ala. 431. The original bill, seeking to enforce the supposed lien, was, therefore, without equity. (2.) The original bill did not contain the necessary averments to set aside the conveyance to Mrs. Caroline Lipscomb as fraudulent. It alleged a fraudulent intent on the part of the grantor, but did not connect the grantee with that fraudulent intent; and this was clearly insufficient.—*Flewellen v. Crane*, 58 Ala. 627; *Pickett v. Pipkin*, 64 Ala. 520; *Crawford v. Kirksey*, 55 Ala. 293. (3.) The first amended bill remedied these defective allegations, and assailed the consideration of the deed; but neither that amended bill, nor the original bill, contained any prayer for relief to complainant as a creditor seeking to set aside a fraudulent conveyance; and that relief could not be granted under the general prayer, because it was inconsistent with the specific relief sought by the bill.—*Wiley, Banks & Co. v. Knight*, 27 Ala. 336; *Charles v.*

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DuBose, 29 Ala. 367. (4.) The second amended bill, which first asked, in the alternative, to have the deed set aside on the ground of fraud, was inconsistent with the original bill, and demurrable on that account. If the original bill had been framed in a double aspect, asking such alternative relief, it would have been subject to demurrer.—*Miron v. Ashurst*, 55 Ala. 607; *Gordon's Adm'r v. Ross*, 63 Ala. 363. (5.) Even if that amended bill were properly allowed, the statute of limitations was a bar to the relief specifically sought by it, since it was not filed until after the lapse of ten years from the execution of the deed, and more than ten years after the death of Mrs. Sarah Lipscomb, the grantor.—*King v. Avery*, 37 Ala. 169; *Langford v. Scott*, 51 Ala. 557; *Mohr v. Lenle*, 69 Ala. 180. The statute of limitations was also a bar under the allegations of the original bill, which averred possession taken and held continuously under the deed; and these allegations were admitted and repeated in the answer.—*Lockard v. Nash*, 64 Ala. 385. The amendment afterwards allowed, averring ignorance of the deed for six months, did not avoid the effect of the bar.—*James v. James*, 55 Ala. 53; *Badger v. Badger*, 2 Wall. 87; 7 How. U. S. 819. (6.) The decree against John T. Lipscomb is manifestly erroneous. None of the bills asked any relief against him; there was no judgment at law against him; and the complainant's debt, on which his judgment against Mrs. Lipscomb's estate was founded, was barred, as to him, by the statute of limitations.

R. A. McCLELLAN, *contra*. (No brief on file.)

STONE, J.—The transcript in this cause was evidently prepared by an inexperienced hand. One error in its preparation consists in the fact, that the answer to the first amended bill precedes the answer in chief to the original bill. Other criticisms might be indulged, on the general frame of the transcript. Another fault does not appear to lie at the door of the register. What is known as the attachment suit and proceedings against Sarah Lipscomb, even including the opinion of this court pronounced on appeal, is made an exhibit to the original bill, with the single exception, that the complaint filed in that cause seems to be omitted. A complete transcript of that cause appears a second time in this record, as evidence on the trial. This swells very materially the volume and expense of the transcript for this court, and should have been avoided. There never was any occasion for making the opinion of this court a part of the record.

The bill as first framed, and first amended, presents complainant's claim in a double aspect. First, it seeks to establish,

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and enforce against the estate and heirs of Mrs. Sarah Lipscomb, the lien created by the levy of Mr. McClellan's attachment. Before that attachment suit was reduced to judgment, the defendant, Mrs. Lipscomb, died; and the judgment was rendered only against her administrator. Under this judgment, or under any execution issued upon it, there was no power to sell the lands of Mrs. Lipscomb. Such sale would be, and was, void. *McClellan v. Lipscomb*, 56 Ala. 255; *Boykin v. Cook*, 61 Ala. 472. The death of Mrs. Lipscomb, before judgment recovered, had the effect of dissolving the attachment and destroying the lien.—*Phillips v. Ash*, 63 Ala. 414.

The other aspect of the bill is set forth in section 7 of the original bill, and section 7½ of the amended bill. The original bill was filed in January, 1878, and the first amendment was allowed at the January term, 1879, and filed in February, 1879. This amendment introduces no new subject, but only makes more specific the charge brought forward in the original bill. Such amendment takes effect as of the time the original bill was filed.—Rule 46 of Chan. Practice; 1 Brick. Dig. 704, § 953.

The original bill, section 3, avers that, on the 23d November, 1867, Sarah Lipscomb, by deed reciting a consideration of two thousand dollars, conveyed the lands in controversy to Caroline Lipscomb, wife of John T. Lipscomb. That deed is made an exhibit to the bill. Section 7 of the original bill alleges, "that the deed executed by the said Sarah Lipscomb to the said Caroline Lipscomb, after the levy of said attachment, was and is fraudulent and void, and said pretended conveyance was made for the purpose of hindering and delaying the creditors of said Sarah generally, and [the complainant] especially, from and in the collection of their just debts against the said Sarah." The debt on which the attachment was sued out, and which this bill seeks to enforce, was contracted March 2d, 1860, and was due at twelve months. It will be observed that, in the averments copied above, there is no denial of the consideration, upon which the deed purports to have been executed, nor is it averred that the said Caroline had notice of the alleged fraudulent intent with which Sarah Lipscomb made the conveyance, or that she participated in such fraudulent intent. This averment was insufficient.—*Flewellen v. Crane*, 58 Ala. 627.

In the amended bill, section 7½, this defect is remedied. Its language is: "The complainant alleges, that said deed of Sarah Lipscomb was without consideration. Said deed recites a consideration of two thousand dollars. Complainant [avers] that the vendee in said deed did not pay the said vendor said two thousand [dollars], or any other sum, but that said deed was wholly voluntary." This casts on the defendant the necessity of proving a valuable consideration; and the transaction being be-

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tween near relations, and entered into while a suit was pending to subject the property to the payment of the grantor's debt, to uphold it, it was necessary to prove the consideration to the satisfaction of the court, and to cause it plainly to appear that it was a real contract of sale, upon a real and sufficient consideration.—*Barnard v. Davis*, 54 Ala. 565; *Hubbard v. Allen*, 59 Ala. 283; *Crawford v. Kirksey*, 55 Ala. 293; *Hamilton v. Blackwell*, 60 Ala. 545; *Harrell v. Mitchell*, 61 Ala. 270; *Thames v. Rembert*, 63 Ala. 561; *Donegan v. Davis*, 66 Ala. 362.

The consideration for the present deed, set up in the original answer, was an alleged indebtedness from Sarah to Caroline Lipscomb. That defense entirely failed, both in fact and in law. At the last moment, the answer was amended, and the consideration set up was an alleged indebtedness, of very long standing, from Sarah Lipscomb to John T. Lipscomb. Neither John T., nor any other witness, undertakes to tell how much that indebtedness was; nor is there any satisfactory testimony, explaining the transaction. We concur with the chancellor in holding, that "neither of the defenses is sustained by the proof."

The defendants interposed, as a defense, the statute of limitations—that is, adverse holding under claim of right, for more than ten years before this suit was brought. True, more than ten years elapsed between the making of the deed—November, 1867—and the commencement of this suit, in January, 1878. But, to constitute a right by adverse holding, there must be an actual possession, open and notorious. A deed, though recorded, is not actual possession. There is no proof that either Caroline Lipscomb or her husband took actual possession of the land, until after the death of Sarah Lipscomb. This was less than ten years before this suit was brought. This defense fails on the proof.

It is not necessary to consider the other questions.

The decree of the chancellor is so amended, as to subject the lands to sale under the debt of Sarah Lipscomb, and not under the debt of John T. Lipscomb; and, as amended, it is affirmed.

BRICKELL, C. J., not sitting.

[Dane v. Glennon.]

Dane v. Glennon.*Statutory Action in nature of Ejectment.*

1. *Who is proper party plaintiff; amendment of complaint.*—A statutory action in the nature of ejectment must be brought in the name of the person holding the legal title; and if he is described in the summons and complaint as suing for the use of another, these words may be struck out, by amendment, as surplusage.

2. *Sale of lands for unpaid taxes; description of lands in assessment and deed; admissibility of parol evidence to remove ambiguity.*—When lands assessed and sold for unpaid taxes are described in the assessment, and also in the tax-collector's deed, as "two-thirds ($\frac{2}{3}$) of square 39 in Fisher's tract," without any other words of description or identification, the sale is void for uncertainty and indefiniteness; and the ambiguity being patent, it can not be corrected or explained by extrinsic parol evidence.

APPEAL from the Circuit Court of Mobile.
Tried before the Hon. H. T. TOLMIN.

OVERALL & BESTOR, for appellant.—(1.) An action of ejectment, or other real action, unlike actions for the recovery of money (Code, § 2890), must be brought in the name of the person having the legal title; and when he sues for the use of another person, by the words of the statute, which are general, and embrace "all cases" (§ 2891), "the beneficiary must be considered the sole party on the record." It necessarily follows, when the name of the beneficiary is stricken out, there was no plaintiff on the record.—*Leaird v. Moore*, 27 Ala. 326; *Dwyer v. Kennemore*, 31 Ala. 404. (2.) The description of the lands in the assessment, which was carried into all the subsequent proceedings, was void for uncertainty and indefiniteness. It is not sufficiently certain to support a complaint, a deed, or a verdict.—*McRae v. Tillman*, 6 Ala. 486; *Wright v. Lyle*, 4 Ala. 112; *Crommelin v. Minter*, 9 Ala. 594; *Delouch v. State Bank*, 27 Ala. 437. It falls far short of the particularity and precision required in the summary proceedings by which a citizen's property can be taken for the non-payment of taxes. Blackwell on Tax Titles, 151-3; *Oliver v. Robinson*, 58 Ala. 46; *Milner & Co. v. Clarke*, 61 Ala. 258. (3.) If the sale for taxes had any validity whatever, the redemption from the purchaser, by Fisher's administrator, gave no new title to Fisher's estate, but simply removed an incumbrance or lien from the land. Cooley on Taxation, 368-9; 4 Barr, 26; 27 Penn.

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St. 154. When this redemption was made, Dane was in possession under his purchase at the sheriff's sale; and if it had any effect on his rights, it enured to his benefit as a purchaser of Fisher's estate.

COBBS & TOMPKINS, *contra*.—(1.) The words stricken out were mere surplusage, and the amendment was properly allowed. Code, §§ 2890-91; *Crimm v. Crawford*, 29 Ala. 623; *McBrayer v. Cariker*, 64 Ala. 50; *Stodder v. Grant*, 28 Ala. 418; *Praier v. Miller*, 25 Ala. 520; *Goldsmith v. Pickard*, 27 Ala. 142. (2.) The description of the lands was sufficiently certain to enable a surveyor to locate them. (3.) The lands were sold as the property of Fisher, and the validity of the sale was admitted by him, who attorned to the purchaser as his landlord, and by his administrator, who redeemed; and there was no title or possession that could pass to Dane under his purchase at the sheriff's sale.

SOMERVILLE, J.—This is a statutory action of ejectment, brought by Glennon, in the Circuit Court of Mobile county, against Dane. Both parties claim title through Fisher; Glennon claiming by purchase at an administrator's sale, made in the year 1879, by one Haynie, as the administrator of Fisher's estate, under authority of an order made by the Probate Court. Dane claimed under execution sale made by the sheriff in October, 1875, before Fisher's death; the execution having been issued on a judgment against Fisher, in December, 1874, in favor of one Claude Beroujon, the lien of which was properly kept up by issue of an *alias* in August, 1875.

The suit, as originally brought, was in the name of James K. Glennon, plaintiff, who was described as *suing for the use* of Price Williams. A demurrer was sustained to the complaint, and an amendment was thereupon authorized, so as to strike out the phrase "who sues for the use," &c. The suit was afterwards permitted to proceed in the name of Glennon as plaintiff, against the defendant's objection.

The amendment was clearly authorized by the statute. The action, being in ejectment, should have been brought in the name of the owner of the legal title. Sections 2890-91 of the Code, requiring certain actions to be prosecuted "in the name of the party really interested," and providing that, in certain cases, "the beneficiary must be considered as the sole party to the record," have no reference to suits in ejectment. These requirements are expressly confined to actions on "contracts, express or implied, for the payment of money."—Code, 1876, §§ 2890-91. The phrase allowed to be stricken out by amendment was mere surplusage, and the real party plaintiff to the

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suit was Glennon, not Price.—Code, 1876, § 3156; *Agnew v. Leath*, 63 Ala. 345; *Johnson v. Martin*, 54 Ala. 271; *Dwyer v. Kennemore*, 31 Ala. 404; *Stodder v. Grant*, 28 Ala. 416.

The chief contestation in the case has reference to the admission in evidence of a tax-deed, introduced by the plaintiff for the purpose of giving strength to his title. The land in controversy was sold for default in payment of taxes, in June, 1873; and at this tax-sale Price Williams became the purchaser. After the expiration of the period of redemption, Williams, as purchaser, received the tax-deed in question from the tax-collector, as authorized by statute. Haynie, the administrator of Fisher's estate, in February, 1877, acquired Williams' title, either by *purchase* or *redemption*,—it is immaterial which, in the view of the case we shall take. Upon application to the Probate Court, the land was afterwards sold by the administrator; and at this sale Glennon, the plaintiff, became the purchaser. This is the plaintiff's chain of title, the strength of which must depend upon the validity of these proceedings. It is manifest that, if the tax-sale was, for any reason, void, the court below erred in admitting the tax-deed in evidence, and Glennon's claim of title must fail. In such event, Dane's title would be superior to Glennon's; he having purchased in October, 1875, under an execution against Fisher, the lien of which is admitted to have been kept in full force, and the sale under which was made by the sheriff prior to the sale made by the administrator.

Our opinion is, that the court erred in admitting the tax-deed in evidence. It was void for want of conformity to the requirements of the statute regulating the subject of tax assessments and sales. The *description* of the land, both as assessed and sold, was so uncertain and ambiguous as to be incapable of identification. The statute in force at the time of these transactions contained the following provisions in reference to the certainty requisite in the description of lands authorized to be assessed, and sold for non-payment of taxes. "In case of lands surveyed, or laid out as a town, city, or village, . . . it shall be described by the designation of the number thereof. If it be a part of a lot or block, it may be described by its boundaries, or some other way by which it may be known."—Acts of 1868, § 7, subd. 4, p. 302. It is not made necessary to insert the quantity of such land in the assessment.—*Ib.* p. 302.

The land here sued for, as described in the *complaint*, is designated as "Lots number 4 and 5, in Square number 39, of what has heretofore been known as the Fisher tract." The land described in the *assessment* and the *tax-deed* is as follows: " $\frac{3}{4}$ of Square 39 in Fisher tract." The ambiguity patent on the face of this description is obvious. It may mean (1) *an undivided*

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two-thirds interest, held by the owner, Fisher, by way of tenancy in common; or (2) it may mean an *entirety of two-thirds in area* of the whole square. Which of the two is intended, it is impossible to say; and the ambiguity being patent, can not be corrected by the introduction of extrinsic or parol evidence. Similar descriptions have been adjudged by other courts to be void for uncertainty.—*Bidwell v. Coleman*, 11 Minn. 78, 91; *Adams v. Larrabee*, 46 Me. 516, 519; Burroughs on Tax. 203—205; Hilliard on Tax. 517, § 12.

It has been often held by this and other courts, that, in the sale of lands for taxes, great strictness is required, and every provision of the statute must be punctiliously pursued. Without a rigid adherence to the directions and forms of the statute, the sale is void, and the owner is not divested of his title or estate. *Milner & Co. v. Clarke*, 61 Ala. 258; *Oliver v. Robinson*, 58 Ala. 46; *Lyon v. Hunt*, 11 Ala. 295; *Elliott v. Eddins*, 24 Ala. 508; *Brown v. Veazie*, 25 Maine, 359. In Cooley on Taxation, it is said to be an accepted axiom, when tax sales are under consideration, that "a fundamental condition to their validity is, that there should have been a substantial compliance with the law, in all the proceedings of which the sale was the culmination. This would be the general rule in all cases, in which a man is to be divested of his freehold by adversary proceedings; but special reasons make it peculiarly applicable to tax sales."—Cooley on Tax. 324. A tax-deed takes effect only as the execution of a statutory power. It must, therefore, be construed with some degree of strictness, so as to enable the grantee to identify the land, and the owner to redeem it.—*Hill v. Maury*, 6 Gray, 551. The description must afford the means of identification, and be sufficiently certain not to mislead the owner, or be calculated to mislead him.—Cooley on Tax. 286; *Curtis v. Supervisors*, 22 Wis. 167. The act of 1868, above quoted, does not require more than this; nor can it be construed to require less.

This rule of description need not be applied with rigor to the present case. The ambiguity and uncertainty of description in the land, as first appearing in the assessment, of course, run through all of the subsequent proceedings, including the certificate of purchase and the tax-deed. It is enough to say, that, so far from being accurate and pertinent, as is required in tax assessments and proceedings, it is not sufficiently certain to sustain a complaint or verdict in ejectment, or unlawful detainer; and this conclusion must prove utterly fatal to the validity of the tax-deed.—*Crommelin v. Minter*, 9 Ala. 594; *Bennet v. Morris*, 9 Port. 171; *Alexander v. Wheeler*, 69 Ala. 332; *McRae v. Tillman*, 6 Ala. 486; *Wright v. Lyle*, 4 Ala.

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112; *Hamner v. Eddins*, 3 Stew. 192; *Burroughs on Tax*. 203-205.

The judgment of the Circuit Court must be reversed, and the cause remanded.

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Indictment for Murder.

1. *Special venire in capital case; what is revisable.*—The number of jurors to be summoned in a capital case is matter of discretion with the court, provided the number summoned, including the regular jurors for the week or term, is not less than fifty, nor more than one hundred (Code, § 4874); and the exercise of this discretion is not revisable on error.

2. *Indorsements on indictment.*—The only evidence required by statute, as to the authenticity of an indictment, is the indorsement of the foreman of the grand jury; and the indorsement by the clerk, showing when it was filed in court, may be made at any time while the cause is *in fieri*.

3. *Practice as to filing plea in abatement; what is revisable.*—Whether the defendant shall be permitted to withdraw the plea of not guilty, and interpose a plea in abatement on account of a misnomer, is matter of discretion with the court below, and is not revisable by this court.

4. *Service of copy of indictment on defendant; sufficiency of copy.*—In preparing a copy of the indictment for service on the accused in a capital case (Code, § 4872), the clerk should include in the copy all the indorsements on the original; but the indorsement of the prosecutor's name, or of the fact that there is no prosecutor (*Ib.* § 4778), being matters which are merely directory, and the omission of which does not affect the sufficiency of the indictment, their omission from the copy does not affect its validity, and is not an irregularity which can prejudice the defendant.

5. *Objections to venire, on account of mistakes in names of jurors.* Mistakes in the names of persons summoned as jurors in a capital case, or discrepancies in their names between the *venire* and the copy served on the defendant, are not good ground for quashing the *venire*.

6. *To what witness may testify.*—On a trial under an indictment for infanticide, a witness who examined the dead body of the child may, though not an expert, testify that he "considered it fully developed;" this being a matter of fact open to observation, and the witness being subject to cross-examination as to his use of the words and his knowledge of their meaning.

7. *Abstract charge as to complicity of third person with crime.*—When there is no evidence whatever tending to connect any other person than the accused with the death of the child alleged to have been murdered, or with the concealment of its body where it was found, charges requested, based on the supposed complicity of some other person with the crime, are abstract, and are properly refused on that account.

8. *Proof of venue; failure of record to show.*—When no instruction is given or refused, involving an inquiry into the sufficiency of the evidence to authorize a conviction, or as to the proof of venue, the failure of the bill of exceptions to show that the venue was proved, while it purports

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to set out "substantially all the evidence," will not work a reversal of the judgment.

FROM the Circuit Court of Colbert.

Tried before the Hon. H. C. SPEAKE.

The indictment in this case charged, in a single count, that the defendant, Ann Hubbard, "unlawfully and with malice aforethought killed her infant child, whose sex is to this grand jury unknown, by cutting off its head with some instrument which is to this grand jury unknown; which said child was a new-born infant, and nameless." On being arraigned, the defendant pleaded not guilty, and, as the judgment-entry recites, "asked the court for one hundred jurors; which demand the court refused, and the defendant excepted;" and the court then ordered the sheriff to summon "fifty persons as a jury for the trial of this cause, including those who have been summoned on the regular *venire* and are in attendance on the court," and also ordered a copy of the indictment and of the special *venire* to be served on the defendant. The indictment, as set out in the transcript, bears the indorsement "*No prosecutor, a true bill.*" which is signed by the foreman of the grand jury; and the clerk's indorsement in these words: "*Filed in open court, this 21st day of September, 1881.*" On the trial, as the judgment-entry and the bill of exceptions each recites, "the defendant moved the court to quash the indictment, because the record fails to show that the same was returned into court; which motion was overruled by the court, and the defendant excepted." The bill of exceptions then recites, "The defendant also moved to quash the *same*, because the copy of the indictment served upon her varied from the original, in this: that the original had the words '*No prosecutor*' indorsed on it, and the copy served on her did not contain these words;" while the judgment-entry recites, that the motion was to quash the *venire* on that ground. The record does not show the action of the court on the motion, nor that any exception was reserved to its ruling. "The defendant then asked leave to withdraw her plea of not guilty, and to be allowed to file a plea in abatement for misnomer; which motion the court refused to grant, and the defendant excepted."

During further proceedings in the cause, the sheriff, in drawing the jury, drew from the hat the name of *Pat. Culligin*, which name did not appear in the list of jurors served on the defendant, though the name of *Patrick Cullinger* did appear on said list, bearing the same number as the name of *Pat. Culligin* on the original *venire*; and for this reason, the defendant objected to further proceeding with the trial. The court ordered the defendant to proceed with the trial, to which the defendant duly excepted. Said juror, being then examined, and

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found incompetent. was challenged for cause, and the trial proceeded, and the defendant exhausted her entire number of challenges before the *venire* was exhausted; but said challenges were not exhausted, nor the jury chosen, before the name of said *Pat. Culligin* was called. On the further call of the *venire*, the name of Albert J. Guy was called, and he failed to respond, whereupon the court ordered him fined fifty dollars. The defendant then objected to going on with the trial, and offered to prove that there was not a man of that name living in the county; but the court ordered the trial to proceed, and the defendant excepted.

"On the trial, the State introduced A. W. Ligon as a witness, who testified, that he knew the defendant, and had hired her, about the 1st April, 1881, as a cook and servant about the house; that when she came to his house she had the appearance of being seven or eight months advanced in pregnancy, though she denied it, and said that she had the dropsy; that about the 25th April, after she had been at his house two or three weeks, an old negro man who lived with him (Jack Morgan, by name), came and knocked at his door during the night, and he got up and went out, but saw nothing; that the old man came again to his door, and waked up his wife, who went out; that he got up and went out after day-light, and found considerable blood on the ground," and a substance which he took to be the —; that he then ordered the negro man to take his horse and buggy, and carry the defendant to her mother; that the man took her to her mother's house, and on his return brought him (witness) a bee-gum, in which he found the body of a new-born child, wrapped up in a shawl, and having its head nearly severed from its body. "The State then asked the witness, if the child was fully developed; to which he answered, that he considered it fully developed. To this question and answer the defendant objected, because the witness was not shown to be an expert, and his answer was merely his opinion; which objection the court overruled, and the defendant excepted. The witness stated, also, that he examined the fingernails and toe-nails of the child, and that they were fully grown. The State then introduced said Jackson Morgan as a witness, who lived with said Ligon, and who stated that defendant lived at said Ligon's house about a month and a half; that she looked big, and complained a great deal, saying that she had dropsy; that he stayed in the kitchen with her on the night mentioned by said Ligon, and she was up and down all night, complaining of her bowels, and going out frequently; that he told her he was going to wake up the white folks, but she told him he need not; that he went and waked up the white folks, and Mrs. Ligon came out; that he fell asleep just before day; that he never

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heard any child cry, and did not know that the defendant had any baby; that Ligon sent him with the girl, after breakfast, to her mother's, about two miles in the country; that just before they reached the gate, leading into the field where her mother lived, defendant told him to look under the door-steps when he went back, and find the child, and bury it; that he found the child, on his return, under the steps, wrapped up in a shawl, and showed it to Mr. Ligon, and then buried it; and that the shawl resembled one he had seen the defendant wear. Both of said witnesses testified, also, that the defendant got up that morning, and went about her usual work, milking the cows, &c.; and neither of them reported the facts to any one until about the time of the defendant's arrest, some two or three months after the child was found."

"This was, substantially, all the evidence; and the defendant thereupon requested the following charges," which were in writing: "If, from the evidence, the jury can not say that the murder was not committed by some one else, then they can not say the defendant is guilty;" "To enable the jury to find the defendant guilty, the evidence must show that no one else could have killed the child;" "To enable the jury to convict, the evidence must reasonably show that no one else could have killed the child;" "When it is clear that one of two persons committed the offense, but it is uncertain from the evidence which of the two is guilty, then neither of them can be convicted." The court refused each of these charges, and the defendant excepted to their refusal.

No counsel appeared in this court for the appellant, so far as the record and the docket show; and there is no brief on file.

H. C. TOMPKINS, Attorney-General, for the State.

BRICKELL, C. J.—1. It was matter of discretion in the Circuit Court to order the summoning of any number of jurors for the trial of the accused, if, including the regular juries for the week or term, the number was not reduced below fifty, or did not exceed one hundred.—Code of 1876, § 4874. The exercise of the discretion is not revisable on error.—*Blevins v. State*, 68 Ala. 92.

2. The only evidence of the authenticity of an indictment, which is required by the statute, is the indorsement of the foreman of the grand jury. The indorsement of the clerk, showing its filing in open court, may be made at any time while the cause is *in fieri*.—*Clarkson v. State*, 3 Ala. 378; *Mose v. State*, 35 Ala. 421; *Wesley v. State*, 52 Ala. 182. The indictment bears not only the indorsement of the foreman of the grand

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jury, but also the indorsement of the clerk, showing the day of its filing in open court; and the motion to quash it was properly overruled.

3. Whether the accused should have been permitted to withdraw the plea of not guilty, and interpose a plea in abatement because she was incorrectly named in the indictment, rested in the discretion of the court below, and its action is not revisable.

4. It does not appear that it was shown, as a fact, that there was the asserted variance between the original indictment and the copy served on the accused. The copy was not produced and identified, so that it could be compared with the original. But, if the variance in fact existed, it was immaterial. The statute requiring that the name of the prosecutor shall be indorsed on the indictment, or, if there is no prosecutor, that it shall be so indorsed, is merely directory, and the omission does not affect the sufficiency of the indictment. While it is the duty of the clerk to furnish, for service on the accused, an exact and literal copy of the indictment, with all its indorsements, the omission of an indorsement not a part of the indictment, not entering into its sufficiency, is not an irregularity or error, which can be of prejudice to the accused.—*Ezell v. State*, 54 Ala. 165.

2. The *venire* in a capital case can not be quashed, because of mistakes in the names of the persons summoned as jurors, or because of discrepancies in their names between it and the copy served on the prisoner.—Code of 1876, § 4876; *Hall v. State*, 51 Ala. 9.

6. Whether the child was born alive, and, of consequence, the subject of criminal homicide, was a question of fact for the determination of the jury, in view of all the circumstances of the case. We do not perceive any just objection to the statement of the witness Ligon, that he examined the body of the child, and considered it *fully developed*. The appearance of the body of the child—whether it was fully or partially developed—was matter of observation, and of fact. If the accused desired to ascertain what meaning the witness attached to the term *fully developed*, that could have been elicited on cross-examination.—1 Brick. Dig. 874, § 995.

7. Instructions requested, based, partly or entirely, on a state of facts of which there does not appear to have been evidence, should, for that reason, even though they may state correct legal propositions, be refused.—1 Brick. Dig. 338, § 41. Such instructions, if they have any effect, can serve only to confuse and mislead the jury. There was not the slightest evidence, tending to connect any other person than the accused with the death of the child, or with the concealment of its

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body. It is obvious, if the instructions requested had been given, they would have been an invitation to the jury to pass beyond the evidence, into mere speculations and conjectures as to the complicity of some imaginary person in the crime.

8. The bill of exceptions recites, that it contains "substantially all the evidence," and is silent as to any evidence showing the offense was committed in the county of Colbert. No question appears to have been made in the Circuit Court as to the venue of the offense. No instruction was given, or was requested, upon that point; nor was the attention of the court directed to the want, if there was a want, of evidence showing that the locality of the offense was in Colbert county. In *Frank v. State* (40 Ala. 9), C. J. WALKER dissenting, it was ruled, that if an exception was reserved to the conviction and sentence, the judgment of conviction would on error be reversed, if the bill of exceptions, purporting to set out all the evidence, failed to show the venue was proved, though no charge involving its proof was given or refused. In *Clark v. State* (46 Ala. 307), and *Childs v. State* (55 Ala. 28), it was held error, to refuse an instruction that the defendant could not be convicted, when the bill of exceptions set out all the evidence, and there was a want of evidence of the venue. So, there are numerous cases, asserting that a judgment of conviction will be reversed, because of instructions given which authorize a conviction without proof of the venue.—*Sparks v. State*, 59 Ala. 82; *Gooden v. State*, 55 Ala. 178; *Bain v. State*, 61 Ala. 75. In *Riddle v. State* (49 Ala. 389), a judgment of conviction seems from the very meagre report to have been deemed erroneous and reversible, where the bill of exceptions professed to contain all the evidence, and was silent as to the venue, though no exception of any kind was reserved. In *Williams v. State* (54 Ala. 131), and *Sampson v. State* (*Id.* 241), we held that, whether the evidence was in any respect sufficient for conviction, could be presented only by an exception to the rulings of the court on the evidence. With the mere question of the sufficiency of the evidence to support a verdict, this court can not interfere, unless it was decided by the court below, and the decision made the subject of an exception at the appropriate time.—*Skinner v. State*, 30 Ala. 694. If there had been an instruction given or refused, involving an inquiry into the sufficiency of the evidence to authorize a conviction, the omission of evidence of the venue would have compelled a reversal of the judgment of conviction, in obedience to the authorities we have cited. But no such instruction having been given or refused, this court can not now interfere. It does not lie within our province to grant new trials, in cases civil or

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criminal, because the verdict and judgment may not appear affirmatively to be supported by the evidence.

We find no error in the record, prejudicial to the accused, and the judgment must be affirmed.

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Indictment for Carrying Concealed Weapons.

1. *General exception to entire charge.*—A general exception to an entire charge, containing several separate and separable clauses, some of which are correct, can not be sustained: the particular clauses, supposed to contain error, should be specifically excepted to.

2. *Carrying concealed weapons; charges on evidence, invading province of jury.*—A charge which assumes, as a fact, that “there is no proof as to whether the witness looked to see whether the defendant had a pistol or not,” when the witness had testified that he passed within a few feet of the defendant, while lying on the ground drunk, “but did not examine him,” is properly refused; nor could it be affirmed, as matter of law, that unless the witness, while passing by, “looked to see whether the defendant had a pistol or not, there could be no inference that the pistol was then concealed,” which another witness saw in his hand a short time previously.

FROM the Circuit Court of Lawrence.

Tried before the Hon. H. C. SPEAKE.

The defendant in this case was indicted for carrying a pistol concealed about his person, and pleaded not guilty to the indictment. On his trial, he reserved a bill of exceptions, in which the evidence adduced, and the rulings of the court now presented for revision, are thus stated: “It was admitted by the defendant, that he bought a pistol in the town of Moulton in said county, on or about April 27th, 1881; and that the venue was correctly charged in the indictment. The State then offered one Cheatham as a witness, who testified, substantially, that during the Spring term of said court, 1881, he passed the defendant lying on the road drunk; that his mule shied as he passed, and went by swiftly, and he saw something sticking out of the defendant’s pocket, but could not say whether it was a pistol or bottle; that he did not get off his mule to examine, but went on without further notice, and overtook one McVay about sixty yards from where he passed defendant. The State then introduced said McVay as a witness, who testified, that he passed within six or eight feet of the defendant as he lay on the road, just before said Cheatham passed; that he

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saw no pistol on or about defendant, but did not examine him; and that he went on about three or four hundred yards, where he stopped, and stayed all night with one Woodward. The State then introduced said Woodward as a witness, who testified, that he saw the defendant, soon after said McVay came to his house, pass his house, flourishing his pistol in his hand; and that no one else had passed along said road, after McVay had reached his house, other than the defendant."

"This being, substantially, all the evidence introduced, the court charged the jury, *ex mero motu*, as follows: 'The State must prove, beyond a reasonable doubt, that the defendant carried a pistol concealed about his person, in this county, and within twelve months before the finding of this indictment. The statute is such, as that the pistol is hidden from ordinary observation, and that a casual observer would not discover it. The evidence to establish this offense is reasonably circumstantial; such as, when one walks or rides with another for any distance, or length of time, and sees no pistol about him, and he afterwards draws a pistol from about his person, and exhibits it. If, therefore, the jury believe from the evidence that, when McVay passed the defendant, and he saw no pistol about the defendant, and defendant came along the road shortly afterwards, to the house of said Woodward, exhibiting his pistol; and further, that no one had passed said defendant since McVay and Cheatham passed, then the law would authorize the jury to infer that, when McVay passed the defendant, he had the pistol concealed about his person; and if they believe it was so concealed, and that this occurred in this county, within twelve months before the finding of this indictment, and believe all this beyond a reasonable doubt, then they would be authorized, under the law, to find the defendant guilty; and if they should so find, they should assess his fine at not less than fifty, nor more than five hundred dollars.' The defendant excepted to this charge, and asked the court, in writing, to charge the jury, 'that if McVay, in passing Farley, did not look to see whether he had a pistol or not, and there is no proof as to whether he did look to see whether he had a pistol or not, then there could be no inference that the pistol was concealed when McVay passed by, from Woodward afterwards seeing it.' The court refused this charge, and the defendant excepted to the refusal."

THOS. M. PETERS, and W. P. CHITWOOD, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—The general charge to the jury in this cause

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contains several separate and separable clauses. There was a general exception reserved to the charge, without specifying any particular clause or clauses excepted to. The rule established by this court, in such case, is, that unless the entire charge is faulty, there will not be a reversal, although in some of the separable clauses the primary court may have erred. The party excepting must point out the part of the charge in which error is supposed to have been committed, and make that the subject of his exception. We need not state the reasons on which this rule rests. They have been too often declared to need repetition.—*Elliott v. Stocks*, 67 Ala. 336; *S. & N. Railroad v. McLendon*, 63 Ala. 266. Many parts of the general charge are free from error, while only one clause is here objected to.

The charge asked and refused should not have been given, for more reasons than one. It asked the court to instruct the jury, as fact, that "there is [was] no proof as to whether he [the defendant] had a pistol or not." McVay testified, that he had passed within six or eight feet of defendant, as he lay on the ground, but that he did not examine him. That he did not *examine* him, does not necessarily imply that he did not *look at* him. Nor, if the charge had been stated hypothetically, could it be affirmed, as matter of law, that unless the witness looked "to see whether he had a pistol or not," then "there could be no inference that the pistol was concealed." Such charge requires too strict a measure of proof, and would be an invasion of the province of the jury. Rules of law must be declared by the court, while inferences of fact are for the jury. That a defendant, afterwards seen with a pistol, had previously had it concealed about his person, a jury may be, and often is, convinced beyond a reasonable doubt, although no witness does or can testify that he had looked to see whether he had a pistol or not.—1 Brick. Dig. 338, § 41; *Ib.* 340, § 65; *Carter v. The State*, 33 Ala. 429; *Clark v. Goldard*, 39 Ala. 164; *Ashworth v. The State*, 63 Ala. 120; *Robinson v. Bullock*, 66 Ala. 548.

Affirmed.

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Prosecution under Bastardy Statute.

1. *Nature of proceeding.*—A prosecution under the statute relating to bastardy (Code, §§ 4071-93) is neither strictly civil nor strictly criminal, but partakes of the nature of both, and is rather of a *quasi-criminal* character.

2. *Challenge of jurors; how many allowed.*—The statute does not prescribe the number of peremptory challenges, to which the defendant shall be entitled; and he can not complain that he was allowed only four challenges, as in civil cases, instead of six, as in criminal cases.

3. *Charge as to sufficiency of proof when evidence is conflicting.*—A charge requested, which instructs the jury that, when one witness swears to the existence of a fact, and another witness, of equal credibility, swears to its non-existence, the fact is not proved, unless there is other satisfactory proof of it, which, standing alone, would be sufficient to establish the probability of its truth, if not erroneous, is certainly misleading, and therefore properly refused.

4. *Proof that prosecutrix is an unmarried woman.*—When the complaint, being in proper form, and under oath, alleges that the prosecutrix is a single woman, the truth of that allegation is necessarily a part of the issue to be tried; and on the issue made up under the direction of the court, "as to who was the real father of the child mentioned in the complaint," the jury having returned a verdict against the defendant, finding that he was the father of the child, this court will not reverse the judgment, because the record does not affirmatively show that proof was made of the fact that the prosecutrix was a single woman.

APPEAL from the Circuit Court of Baldwin.

Tried before the Hon. WM. E. CLARKE.

This was a prosecution under the bastardy statute (Code, §§ 4071-93), instituted on the complaint of Josephine Ladnier, who made oath before a notary public (and *ex officio* justice of the peace) "that she is a single woman, and a resident of said county; that she was delivered of a female bastard child in said county, on or about the 5th February, 1880, and that William C. Dorgan is the father of said bastard child." The defendant was arrested upon a warrant issued by the magistrate, and, waiving an examination, gave bond for his appearance at the next term of the Circuit Court. In that court, a complaint was filed against him, in these words: "The State of Alabama charges, that William C. Dorgan, the defendant, is the real father of the female bastard child begotten of Josephine Ladnier, in Baldwin county, as alleged in the affidavit in said cause;" and the judgment-entry recites, that an issue "was made up, by and under direction of the court, as to who was the real

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father of a certain female child mentioned in the complaint." On the trial, as the bill of exceptions recites, when the prosecuting officer had announced that he was satisfied with the jury, "the defendant asked the court, how many challenges he would be entitled to; and the court replied, only four peremptory challenges; to which ruling the defendant excepted, but did not afterwards challenge as many as four of the jurors." The prosecutrix, who was examined as a witness on the part of the State, testified that the defendant was the father of her child, and that no one else had had criminal intercourse with her for several years prior to its birth; while the defendant, testifying as a witness for himself, denied that he was the father of the child, but admitted his criminal intimacy with the prosecutrix; and other witnesses for him testified to facts which tended to show criminal intercourse between her and other men prior to the birth of the child. The bill of exceptions does not purport to set out all the evidence adduced.

The defendant requested the following charges, which were in writing: "1. If there is not satisfactory evidence of the guilt of the accused, and the question of guilt depends upon the testimony of said Josephine Ladnier and of said W. C. Dorgan; then, if Josephine has testified that Dorgan is the father of the child, and he has testified that he is not, and both are equally worthy of belief, then the fact is not found" [*proved?*] "2. If one witness swears to the existence of a fact, and another witness, of equal credibility, swears that the fact is not true; then the fact is not proved, unless there is other satisfactory proof of the fact." "The court refused each of these charges, and the defendant excepted to their refusal."

The errors assigned are, the refusal of the charges asked, and the rendition of judgment against the defendant on the verdict, "when there was no sufficient issue made up, it not appearing in the issue that the prosecutrix was a single woman, and the proof not showing that she is a single woman."

JAMES COBBS, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

SOMERVILLE, J.—A proceeding under our statute in a bastardy case (Code, 1876, §§ 4071 *et seq.*) has been held by this court not to be a misdemeanor, or otherwise strictly criminal in its nature, though adjudged to be penal in some of its characteristics.—*Paulk v. State*, 52 Ala. 427; *Satterwhite v. State*, 28 Ala. 65. In *State v. Hunter*, 67 Ala. 81, we pronounced the sounder and better view to be, that such proceeding was *sui generis*, partaking of the nature of both a criminal prose-

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cution and of a civil suit—or, in other words, that it was neither a civil suit, nor a criminal prosecution, but rather of a *quasi-criminal* character.

In this view of the matter, the court did not err in refusing to allow the appellant as many as *six* peremptory challenges, which is the number prescribed by section 4879 of the Code in the trial of misdemeanors. He could not complain that he was restricted to only *four* such challenges, the number allowed in the trial of civil causes.—Code, § 3016. At common law, peremptory challenges were never allowed in civil suits, but only in criminal cases punishable capitally.—*United States v. Cottingham*, 2 Blatch. (C. C.) 470; 4 Black Com. 354. No express provision seems to be made by statute touching this matter in bastardy cases,—a clear instance of *casus omissus*, unless it can be supplemented by adopting the rule applicable to civil cases, upon principles of analogy.

The two written charges requested by the appellant, were certainly misleading, if not erroneous, and were properly refused. They are each obnoxious to the construction, that where one witness swears to the existence of a fact, and another witness of equal credibility, or equally worthy of belief, swears to the non-existence of the same fact, the fact is not proved, unless there is other satisfactory proof of it, which, standing alone, would of itself be sufficient to establish the probability of its truth. In such cases, a very slight circumstance, or fact, might be sufficient to corroborate the one witness or the other, so as to produce a rational conviction of the truth or falsity of the *factum probandum*, when, standing alone and disconnected, it might weigh very little with the jury, and be totally inadequate for this purpose.

It is provided by the statute, that “the court, on the appearance of the accused, must, if he demand it, cause an issue to be made up, to ascertain whether he is the real father of the child or not.”—Code, § 4078. The judgment-entry recites, that an issue was made up, under the direction of the court, “as to who was the real father of a certain female child *mentioned in the complaint*,” and the jury returned a verdict in favor of the State, and that they found that the defendant was the real father of the child. The issue joined and tried was, evidently, one having reference to the statements set forth in the complaint, which was under oath, and contained the necessary averments required by the statute.—Code, 1876, § 4071. The complaint alleges, that the prosecutrix was a *single woman*; and the truth of this alleged fact was necessarily a part of the issue made up and tried. The complaint, therefore, presents a substantial ground of accusation, or cause of action, coming within the statute; and this court will not reverse the cause, for the mere reason

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that the *evidence* set out in the bill of exceptions fails to show that the complainant was single, or unmarried. This court has no power to review the verdict of a jury in their findings on the evidence.—*Austin v. Pickett*, 9 Ala. 102; *Shouse v. Larocence*, 51 Ala. 559.

Affirmed.

Nicholson v. The State, ex rel. Collins.

Prosecution under Bastardy Statute.

1. *Former acquittal, or conviction.*—A former acquittal or conviction, pleadable in bar of another prosecution, pre-supposes a trial before a court having jurisdiction to render a judgment on the merits; and this effect can not be attributed to a decision rendered by a court whose authority is limited to the inquiry, whether there is sufficient cause shown for sending the accused to a court having jurisdiction to try and determine the charge.

2. *Same; jurisdiction of justice of the peace, in bastardy proceedings.* In a prosecution for bastardy (Code, §§ 4071-80), the justice of the peace, before whom the complaint is made, has no more power to render a final judgment of acquittal, than a judgment of conviction; and if he finds from the evidence adduced that there is not probable cause to believe that the defendant is the father of the child, and therefore discharges him, such discharge can not be pleaded in bar of another prosecution.

3. *Relevancy of suspicious circumstances, implying admission or consciousness of guilt.*—In a prosecution for bastardy, the defendant denying that he had sexual intercourse with the prosecutrix at the time alleged by her, but admitting that he then had opportunities for such intercourse, and that he had intercourse with her at a subsequent time; the fact that, during the woman's pregnancy, which was well known in the neighborhood, he made inquiries and offers to pay for the means of making a woman miscarry, is relevant and competent evidence against him, though he professed to make such inquiries and offers for another person.

APPEAL from the Circuit Court of DeKalb.

Tried before the Hon. LEROY F. BOX.

This prosecution was commenced before a justice of the peace, on the 3d August, 1882, on the complaint of Maria Collins, alleging that she had given birth to a bastard child, and that Joseph Collins was its father. The defendant was required by the justice to give bond for his appearance, at the next ensuing term of the Circuit Court, to answer the charge. In that court, he filed a plea of *res adjudicata*, or former acquittal, alleging that he had been arrested on the same charge, on a complaint made by the prosecutrix, before another justice of the peace, on the 3d June, 1882; and that said justice, on

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hearing the evidence adduced, discharged him. The court sustained a demurrer to this plea, and the defendant then pleaded not guilty. On the trial, as appears from the bill of exceptions, the prosecutrix testified, that the child was begotten on the 15th August, 1881, and was born on the 8th May, 1882; that the defendant was its father, and that she had never had sexual intercourse with any other man. The defendant, testifying as a witness for himself, admitted that he had sexual intercourse with the prosecutrix on the 20th December, 1881, and again on the 12th January, 1882, but denied that he had at any other time; and he admitted that he went to her house, on her invitation, in August, 1881, found her alone, and took liberties with her person without objection on her part. A witness introduced by the defendant also testified, that he had sexual intercourse with the prosecutrix in July, August, and September, 1881, and that her character for chastity was bad. The parties were all colored persons. "Maria Burton, a colored woman, testified as a witness for the plaintiff, as follows: 'I am acquainted with Maria Collins, and with Joseph Nicholson. Joseph Nicholson came to me in the summer or fall of 1881, and said that a man had got him to find out if I knew anything that would make a woman miscarry; that the man agreed to give him five dollars, if he would find out something to make a woman miscarry; and that he would pay me if I would tell him—that I owed him a small amount, and he would give it to me if I would tell him. I told him that I knew nothing to make a woman miscarry. This was after I knew that Maria Collins was pregnant. This was all the conversation, and her name was not mentioned.' Thereupon, the defendant moved the court to exclude the testimony of said witness, as to her conversation with him, on the ground that the same was illegal and irrelevant; that said conversation did not connect the prosecutrix with defendant's said inquiry, and did not show that he referred to her or himself as the person desiring the information asked for. The court overruled said objections, and permitted the evidence to remain with the jury; to which ruling the defendant duly excepted." The admission of this evidence, and the sustaining of the demurrer to the plea of former acquittal, are now assigned as error.

McSPADDEN, CARDEN & BURNETT, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

BRICKELL, C. J.—The only jurisdiction a justice of the peace can exercise, in a proceeding for bastardy, is an examination to ascertain whether there is probable cause to believe the

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accused is the father of the child. If, after an examination of the mother of the child and her witnesses, and of the accused and his witnesses, there is probable cause to believe the accused is the father of the child, bail for his appearance at the next term of the Circuit Court must be required of him; and if he fail to give bail, he must be committed to jail. In the Circuit Court, an issue is formed, to ascertain whether the accused is the father of the child; and on the determination of the issue, the only final judgment is pronounced which is rendered in the proceedings. The justice not having jurisdiction to make an order of filiation, or to pronounce any judgment on the merits, the order he may make, declaring either that there is, or is not, probable cause to believe the accused is father of the child, is not a judgment of conviction, or of acquittal, which can be pleaded in bar.—*Marston v. Jenness*, 11 N. H. 156; *Davis v State*, 6 Blackf. 494. An acquittal, or a conviction, pre-supposes a trial before a court having jurisdiction to pronounce judgment on the merits. A mere hearing before a court limited to the inquiry, whether there is sufficient reason for sending an accusation to a court of competent jurisdiction, to make final disposition of it, whatever may be the result of it, is conclusive upon no one. The justice of the peace was as wholly without power to render a judgment of acquittal, as he was to render a judgment of conviction. The order rendered by him, discharging the defendant, ascertained only that, upon the examination had before him, there was not probable cause to believe the defendant was the father of the child. The order did not preclude a new examination, and had no other effect than an examination before a grand jury, followed by a refusal to find a true bill, would have upon the power and action of a succeeding jury.

2. The general rule, in regard to the relevancy of evidence, is, that facts and circumstances, which, when proved, are incapable of affording any reasonable presumption or inference as to a material fact or inquiry involved in the issue, can not be given in evidence.—*State v. Wisdom*, 8 Port. 511; *Campbell v. State*, 23 Ala. 44. It is often a most embarrassing question to determine, whether a particular fact or circumstance is too remote to admit of any just, reasonable direction to the jury, in arriving at a conclusion upon, and determining the main point of inquiry. A fact or circumstance may, in itself, seem trivial, or wholly disconnected with the main fact, the subject of inquiry; and yet, when connected with other facts, of which there is evidence, may aid materially in reaching a satisfactory conclusion. Manifestations of guilt, or of a consciousness of guilt, at or about the time an offense is committed, or in the presence of suspicion or accusation of it, are facts and circum-

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stances which may be proved, to connect the person from whom they proceed with the offense. The destruction of the fruits of a crime, or preparation to destroy them, is also a fact of which evidence may be given. The pregnancy of the relator was a known fact, as was, of course, the fact that it was the result of illicit intercourse. That at this time the defendant, who had antecedent opportunities for such intercourse, should be making inquiries and propositions to pay for the means of making a woman miscarry—for producing abortion—may, of itself, be very weak and inconclusive evidence; yet we think it was a fact for the consideration of the jury, in connection with the evidence of the prosecutrix that he had sexual intercourse with her at a preceding time, which he denied, asserting that it was at a subsequent time. That he proposed to make the inquiry for another, may affect the weight of the fact of inquiry, or may add to it, as the jury may credit the profession, but does not render it inadmissible.

Affirmed.

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Indictment for Murder.

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1. *New trial; refusal not revisable.*—By the uniform decisions of this court since its first organization, the granting or refusal of a new trial rests in the sound discretion of the primary court, and is not revisable on error or appeal.

2. *Same; separation of jurors, or other misconduct.*—In appellate courts which reverse judgments or orders refusing a new trial, the safer and sounder rule seems to be, that a new trial is not granted as a matter of course, merely because the jurors were not kept under the eye of an officer from the beginning to the end of the trial, but that such irregularity makes out a *prima facie* case for a new trial, and casts on the prosecution the *onus* of showing affirmatively that the jurors were not tampered with; and that being affirmatively shown, a new trial should not be granted.

From the Circuit Court of Lauderdale.

Tried before the Hon. H. C. SPEAKE.

No counsel appeared in this court for the appellant, so far as the record and the dockets show; and there is no brief on file.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—No questions were raised in this case, until af-

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ter the jury had returned a verdict of guilty. A motion was made for a new trial, which was overruled; and to the ruling of the court refusing a new trial, the prisoner reserved exceptions. The rulings of this court, from its very origin, have been unbroken, that error can not be assigned on the refusal of a primary court to grant a new trial. This, we have held, is a matter resting in the sound discretion of the judge who hears the evidence, and presides over the trial.—*Franklin v. The State*, 29 Ala. 14; *Tyree v. Parham*, 66 Ala. 424; 2 Brick. Dig. 276, § 1.

The objection urged in this case for a new trial is, that during an adjournment, pending the trial, one or more of the impanelled jurors was permitted to absent himself from the body of the jury, unattended by an officer. It is not shown that these jurors conversed with any person, or were conversed with, while they were so absent from their fellows. The implications from the bill of exceptions are, that such was not the case. The mere fact that jurors, pending a trial for felony, are not kept together in the care of an officer, is not necessarily ground for a new trial. In appellate courts which entertain jurisdiction on appeal from orders overruling such motions, a new trial is not a matter of course, from the mere fact that the jury had not been, all the while, kept together under the eye of the officer. Some courts hold that, *prima facie*, such irregularity calls for a new trial, and the *onus* is on the prosecution to show affirmatively that the jury had not been tampered with. Possibly, this is the safer and sounder rule. The inquiry is easily made, and a proper investigation had, in the court trying the cause. If any of the jurors have been conversed with, on questions affecting the prisoner's guilt; or, if other influences have been exerted, which may have biased their deliberations, a new trial should be granted. On the other hand, if there be an entire negation of such interference, there is no ground for setting aside the verdict.—*Williams v. The State*, 45 Ala. 57; *Morgan v. The State*, 48 Ala. 65; *Williams v. The State*, *Ib.* 85; 1 Bish. Cr. Proc. §§ 993, 999, and note 4.

What we have said above is merely suggestive of the duty of primary jurisdictions, in such conditions. We have no authority to revise such judicial action.

The judgment of the Circuit Court is affirmed.

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Action on Official Bond of Tax-Collector.

1. *Discharge of sureties by judgment discharging principal.*—Where a tax-collector executed an additional bond, as required on the address of the grand jury (Code, §§ 184-90), on which was one new surety besides the sureties on the first bond; and separate actions were brought on each bond, and the same breaches assigned for a default covered by each; *held*, that a judgment on verdict in an action on the first bond, in favor of the defendants, operated as a discharge of the principal and sureties on the second bond, and was pleadable in bar of the action on that bond.

APPEAL from the Circuit Court of Clarke.

Tried before the Hon. H. T. TOULMIN.

This action was brought in the name of the State of Alabama, against Seth J. Parker, A. M. Wing, and F. P. Baker; was commenced on the 17th August, 1879, and was founded on an official bond executed by said defendants,—Parker as tax-collector of said county, and the other defendants as his sureties,—which, as set out in the complaint, was in these words: “Know all men by these presents, that we, Seth J. Parker, A. M. Wing and F. W. Baker, in consideration of advisory instructions to the honorable Circuit Court, by the honorable grand jury of the Spring term of said court, 1876, recommending additional surety on the bonds of certain officers, do, in obedience to such recommendation as regards the present incumbent, S. J. Parker, tax-collector for Clarke county, do hold and firmly bind, and by these presents are held and firmly bound (as additional surety on the bond of said S. J. Parker), unto the State of Alabama, in the sum of ten thousand dollars; for the payment of which, well and truly to be made, we bind ourselves,” &c., “jointly and severally. Sealed with our seals, and dated the 8th May, 1876. The condition of the above obligation is such, that whereas the above-named S. J. Parker has been elected tax-collector for Clarke county, now, if the said S. J. Parker shall faithfully perform all the duties which are or may be by law required of him as such tax-collector, during the time he continues in said office, or discharges any of the duties thereof, then the above obligation to be void,” &c. The complaint alleged, that said Parker was elected tax-collector at the general election in November, 1874, and gave bond, as required by law, for the faithful performance of his duties; that he afterwards executed the bond sued on, under an address or requis-

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tion of the grand jury, as shown by its recitals, and said bond was accepted and approved by the probate judge. One of the breaches alleged was, his failure to account for and pay over the taxes assessed and collected "for the years 1876 and 1877." The defendants each filed several pleas in bar, setting up a verdict and judgment in favor of the defendants in a former action, founded on Parker's original bond as tax-collector. This bond is not set out in any of the pleas, but it is described as having been executed by "said Parker and others," and it appears that said A. M. Wing was not one of the obligors. There is in the record, also, a plea which purports to have been filed by one *Osceola Wilson*, in a cause in which "Seth J. Parker, *Osceola Wilson*, A. M. Wing, F. W. Baker *et al.*," are named as the defendants; but said Wilson's name nowhere else appears. The overruling of demurrers to these several pleas of *res adjudicata* is the only matter assigned as error.

H. C. TOMPKINS, Attorney-General, and J. S. DICKINSON, for appellant, cited *State Bank v. Robinson*, 8 Eng. (13 Ark.) 214; 2 Phil. Ev. § 1, pp. 2-26; 2 Smith's L. C. 580, 653, 675; 2 Parsons on Contracts, 235, 239; 18 Ala. 241; 3 Stew. & P. 369; 29 Ala. 147; 16 Ala. 271; 31 Ala. 234; 25 Ala. 300; 26 Ala. 504.

H. PILLANS, *contra*, cited *Baldwin v. Gordon*, 12 Mart. La. 378; *Farmer's Bank v. Kingsley*, 2 Doug. Mich. 379-403; *Ames v. Maclay*, 14 Iowa, 281; *Gill v. Morris*, 11 Heiskell, 614; *Beale v. Cochran*, 18 Geo. 38; *Couch v. Waring*, 9 Conn. 261; *Miller v. Gaskins*, 1 Sm. & Mar. Ch. 524; 13 La. Ann. 249.

SOMERVILLE, J.—The appellee, Parker, executed his official bond as tax-collector of Clarke county, in September, 1874, conditioned for the faithful discharge of his duties in such capacity. This bond covered the entire duration of his official term, including the years 1874, '75, '76, and '77. He also executed, in May, 1876, an *additional* bond, on requisition of the grand jury, in accordance with the provisions of the statute. This covered parts of the two years 1876 and 1877. There is one surety on the second bond, who was not an obligor on the first bond. Suits were instituted on each bond separately; the assignments of breaches being identical in each suit, so far, at least, as the obligations of the two instruments were commensurate in point of time. Among other breaches averred, in the first action, was the failure of Parker to account for the taxes collected by him for the State during the years 1876 and 1877 severally. The same breaches were averred in the action on

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the second bond. The jury, upon the trial of the first cause, rendered a verdict in favor of the defendants. It is insisted that *the judgment on this verdict operates, in the second suit, as a discharge, not only of the principal, Parker, but also of his sureties on the second bond.* The correctness of this proposition is the question presented for decision.

A contract of suretyship is usually defined to be a contract whereby one person engages to be answerable for the debt, default, or miscarriage of another.—Brandt on Suretyship, § 1. In *Evans v. Keeland*, 7 Ala. 36, 56, it was said to be “an obligation *accessorial* to that of the principal debtor.” It was further observed: “The debt is due from the principal, and the surety is merely a guarantor for its payment. A corollary from this definition is, that it is of the essence of such a contract that there be a valid obligation of the debtor.”—*Ib.*, 7 Ala. 46.

The general rule, touching the question under consideration, is stated by Mr. Brandt to be, that “if the principal is discharged, because of matters inherent in the transaction, even after judgment against the surety, the latter will be exonerated thereby;” and he cites several adjudged cases in support of this view. By matters inherent in the transaction, we understand defenses that go to the whole consideration, assailing the original validity of the contract, or showing its subsequent discharge by performance, release, or otherwise.—Wells’ *Res Adjudicata*, p. 83, § 88; p. 90, § 105. There are certain well-established exceptions to this rule. Among these are cases where the principal is discharged by operation of law; as in case of bankruptcy, insolvency, the statute of *non-claim*, and the like.—*Garnett v. Roper*, 10 Ala. 842; *McBroom v. Governor*, 6 Port. 32; Brandt on Sur. § 126. This exception is based upon the reason, that the discharge, being by operation of law, is without the consent or procurement of the creditor, and, therefore, the surety ought not to be discharged.—*Phillips v. Wade*, 66 Ala. 53; *Phillips v. Solomon*, 42 Ga. 192. Another exception is, where the invalidity of the contract rests on some ground personal to the principal; as coverture, infancy, or other like disability.—*Bean v. Chapman*, 62 Ala. 58; Brandt on Sur. § 128; *St. Alban’s Bank v. Dillon*, 30 Vt. 122; *Gale v. Wheelock*, 109 Mass. 502.

There are many reported cases illustrative of the principle under discussion. In *Gill v. Morris*, 11 Heisk. 614 (27 Amer. Rep. 744), a suit was instituted against a surety, for a sum of money loaned to his principal by the plaintiff, in Confederate money, or treasury-notes of the late government of the Confederate States. The surety was allowed to plead successfully, in bar of the action, a judgment discharging the principal on account of the adjudged illegality of the contract. True, the

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parties in the two actions not being the same, the judgment in the former case, discharging the principal, was, as to the surety, *res inter alios acta*; but the court regarded the case under consideration as an established exception to the general rule, that the estoppel of judgment is limited to parties and privies. The decision was placed on the broad principle of the common law, that whatever operates as a partial, or total exoneration of the principal, will necessarily have the same effect in favor of the surety.

In *Ames v. Macclay* (14 Iowa, 281), an action was brought against a sheriff and the sureties on his official bond. The sureties pleaded severally, and judgments were recovered against them alone. Afterwards, there was a trial of the cause against the principal in the bond, and a judgment was rendered in favor of the principal. It was held, that equity would perpetually enjoin the enforcement of the judgments against the sureties; which was, perhaps, carrying the rule too far, in view of the *laches* of the sureties in failing to make their defense in due time at law. The decision was based on the ground, that the judgment in favor of the principal extinguished the debt, and "the principal thing being thus destroyed, the incident (the obligation of the surety) is destroyed with it." A similar ruling was made in *Beall v. Cochran*, 18 Ga. 38, and in *King v. Baldwin*, 2 John. Ch. 557.

In *Brown v. Bradford*, 30 Ga. 928, the sureties of a sheriff were allowed to avail themselves of a judgment previously rendered in favor of their principal, in another suit, to which they were not parties. The action was for the alleged default of the sheriff; and the court say, that "he [the sheriff] was not in default in refusing to account for this money, after there was a judgment of the proper court that he had already accounted for it once, and was not bound to account for it any more."

In *Dickson v. Bell*, 13 La. An. 249, a like ruling was made, in favor of the sureties of an administrator, holding that they would be protected by a judgment rendered in a different action, in favor of their principal. See, also, *Jackson v. Griswold*, 4 Hill, 522; *Miller v. Gaskins*, 1 Sm. & Mar. (Ch.) 524; *Res Adjudicata* (Wells'), p. 83, § 88; p. 90, § 105; *Couch v. War-ning*, 9 Conn. 261; *Baker v. Kennett*, 54 Mo. 82; *Patterson v. Cave*, 61 Mo. 439; *Kane v. Young*, 34 Pa. St. 60.

We are of opinion, that the judgment discharging the appellant, Parker, in the first action, operated to discharge, not only himself, but also his sureties in the action on the second, or additional bond. The liability of the principal being adjudged not to exist, the liability of the sureties falls with its extinguishment.

The proper application of these principles compels an affirm-
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ance of the judgment of the Circuit Court, which is accordingly hereby ordered.

Affirmed.

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Application for Mandamus, by Solicitor against County Treasurer.

1. *Compensation of solicitor in Mobile, under special statute.*—Under the special statute regulating the expenditures of Mobile county, approved February 11th, 1843 (Sess. Acts 1842-3, p. 77); the second section of which provides, "that the moneys arising from fines and forfeitures shall be subject to a charge of five per cent. on the amount that shall be collected, in favor of the solicitor of the circuit, in consideration of the number of cases in which costs remain uncollected, and in consideration of his services in collecting and paying the same to the county treasurer;" the solicitor can claim compensation, not on the entire amount of fines and forfeitures collected and paid into the treasury, but only on the amount collected and paid in by him.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

On the 29th October, 1881, a petition was filed and presented to the presiding judge of the Mobile circuit (Hon. H. T. TOLMIN), in the name of the State, on the relation of John R. Tompkins, praying a *mandamus* against S. Graham Stone, as county treasurer of Mobile, commanding and requiring him, as such treasurer, to receive, number and register a claim held by the relator, which he insisted was a lawful charge on the fine and forfeiture fund of the county in the hands of said Stone as treasurer. The petition alleged, that the relator was duly elected and qualified as the solicitor of the circuit which included the county of Mobile, and discharged the duties of the office from June, 1877, to December, 1880; that during that period "there was collected and paid, for the use of the Fine and Forfeiture Fund of said county, moneys arising from fines and forfeitures on convictions obtained where petitioner prosecuted in the Criminal Court of said county, a large sum of money, to-wit: the sum of \$18,645, and more; for which petitioner claims that he is entitled by law to five per cent., to-wit: the sum of \$932.25, against the Fine and Forfeiture Fund of said county, under the provisions of an act of the General Assembly of Alabama, entitled 'An act to regulate the expenditures of the county of Mobile, and for other purposes' (Acts of 1843, pp. 77-8), which

[The State, ex rel. Tompkins v. Stone.]

act has never been repealed." The petition alleged, also, that there was no proper officer to whom this claim could be presented, the office of county treasurer in Mobile having been abolished, until the office was again established by the statute approved March 1st, 1881, and S. Graham Stone was appointed and qualified as county treasurer under its provisions; that the claim was presented to the county commissioners on the 14th December, 1880, accompanied with a tabulated statement showing the cases from which the moneys arose, and duly verified by affidavit, and was by them rejected; that the claim was presented in June, 1881, to the said county treasurer, "whose duty it was and is to receive and disburse the said fund, and to number, register, and pay all claims, in the order in which they are presented,—presentation, numbering and registration being a condition precedent to their payment," and that said Stone refused to receive, number, or register the claim. Wherefore, a *mandamus* was prayed, &c.

On the filing of this petition, a rule *nisi* was made and granted by Judge Toulmin; and the defendant appeared, in answer to the rule, and demurred to the petition. One of the causes of demurrer specially assigned was, "that said petition does not allege or show that any of the fines and forfeitures therein mentioned were collected and paid to the county of Mobile, or to the treasurer of said county, by the relator, said John R. Tompkins." The court sustained the demurrer, and, the relator declining to amend, rendered final judgment dismissing the petition at his costs. The judgment on the demurrer is now assigned as error.

C. J. TORREY, and JOHN R. TOMPKINS, for appellant.

WM. G. JONES, *contra*. (No briefs on file.)

BRICKELL, C. J.—The claim of the relator is founded on the second section of an act approved February 11th, 1843, entitled "An act to regulate the expenditures of Mobile county, and for other purposes" (Pamph. Acts 1842-3, p. 77), which reads as follows: "That the moneys arising from fines and forfeitures shall be subject to a charge of five per cent., on the amount that shall be collected, in favor of the solicitor of the circuit to which the county of Mobile may be attached, in consideration of the number of cases in which the costs remain uncollected, and in consideration of his services in collecting and paying the same to the county treasurer." The collection of fines and forfeitures was not an official duty of the solicitor, and authority to collect them was given only to the officers of court in which judgment for them was rendered, whose duty it

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was to pay them to the county treasurer.—Clay's Dig. 249, § 10. The act under consideration confers on the solicitor authority to collect fines and forfeitures,—an authority not exclusive, but cumulative to that of the sheriff or clerk,—and compensates him for the services rendered in collecting and paying to the county treasurer. The reason assigned in the act, for conferring the authority and allowing the compensation to the solicitor of the circuit to which the county of Mobile is attached (a special authority, and special compensation, confined to that county), is, "the number of cases in which costs remain uncollected." But the statute limits the compensation, nevertheless, to services rendered in collecting and paying over the fines and forfeitures to the county treasurer. If the service is not rendered, the compensation is not allowed, though fines and forfeitures arise from services rendered by the solicitor in his representation of the State in the courts. For such representation, the statutes provide other compensation, and the mode of its payment.

"The invariable test, by which the right of a party applying for a *mandamus* is determined, is to inquire, first, whether he has a clear, legal right; and if he has, then, secondly, whether there is any other adequate remedy to which he can resort."

Withers v. State, 36 Ala. 252. The relator does not aver that he collected and paid to the county treasurer any of the fines upon the amount of which he claims the compensation of five per-centum. It is not shown that he has rendered the services the statute compensates. Not showing that he has a legal claim upon the Fine and Forfeiture Fund, the county treasurer properly refused to register the claim presented.

As this conclusion is decisive of the case, we do not deem it necessary to enter on a consideration of the other questions which have been argued by counsel. Let the judgment be affirmed.

Anderson v. The State.

Indictment for Illegal Voting.

1. *Illegal voting; disfranchisement by conviction of larceny.*—The constitutional provision which disfranchises all persons who "shall have been convicted of treason, embezzlement of public funds, malfeasance in office, larceny, bribery, or other crime punishable by imprisonment in the penitentiary" (Art. VIII, § 3), while it applies to all felonies not specifically named, includes all grades of larceny, or other offenses particularly named, whether felonies or misdemeanors; consequently a person convicted of petit larceny is disfranchised and disqualified as a voter.

[Anderson v. The State.]

From the City Court of Mobile.

Tried before the Hon. O. J. SEMMES.

The defendant in this case, Wash. Anderson, was indicted for illegal voting; the indictment charging that, "having been duly convicted and sentenced for the offense of petit larceny in this State, he knowingly and willfully voted at the last general election held in this State on the first Tuesday after the first Monday in November, A. D. 1882." There was a demurrer to the indictment, on the ground that a conviction of petit larceny did not disqualify a person as a voter; and the demurrer being overruled, the defendant pleaded not guilty. The same question was presented by a request for instructions to the jury, which were refused, exceptions being duly reserved to their refusal.

F. G. BROMBERG, for appellant.—The constitutional provision perpetually disfranchising a citizen is highly penal.—*Ex parte Dorsey*, 7 Porter, 293; *Cummings v. Missouri*, 4 Wall. 177. Like other penal laws, therefore, it must be strictly construed.—*Bettis v. Taylor*, 8 Porter, 564; *Gunter v. Leckey*, 30 Ala. 597; *Smith v. Causey*, 22 Ala. 568. This provision, and the 18th section of the 4th article, specifying the causes which disqualify a person to hold office, are *in pari materia*, and must be construed in connection with each other; and thus construed, "larceny or other crime punishable by imprisonment in the penitentiary," as used in the former, is synonymous with "other infamous crime," as used in the latter. At common law, all felonies were infamous, and larceny was a felony; but, under our statutes, a felony is an offense which may be punished by imprisonment in the penitentiary, and petit larceny is not a felony. Convictions of bribery, perjury, forgery, "or other high crimes or misdemeanors," have been causes of disfranchisement since the constitution of 1819 was adopted. All the crimes enumerated as the causes of disfranchisement, except larceny, are offenses of a public nature, striking at the integrity of elections, or the life of the State, or are violations of public trusts, or usurpations and oppressions by public servants, or high offenses against persons. Larceny alone is an offense against property, and no reason can be assigned for subjecting petit larceny to the same severe punishment affixed to these grave offenses. In a very large proportion of cases, petit larceny is the crime of youthful persons; and it never could have been the intention of the framers of the constitution, by affixing this unusually severe punishment,—extending through the whole life of the offender, and branding him with a mark which can not be obliterated,—to cut off all hope of reformation, and forever bar him from attaining the full rights and

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privileges of citizenship. The use of the word *other*, before the general term "crime punishable by imprisonment in the penitentiary," shows that the particular crime which disqualifies is that which is punished by such imprisonment.—*Bush v. The State*, 18 Ala. 415; *Macomber's case*, 3. Mass. 257.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—The constitution of Alabama declares, that persons convicted of certain enumerated crimes shall not be permitted to register, vote, or hold office.—Art. 8, § 3. Among the crimes thus enumerated is larceny. It is not denied, in this case, that the defendant had been convicted of larceny since the adoption of the constitution of 1875, and that he afterwards registered, and voted at the general election held in November, 1882. The precise ground of defense urged in the court below, and renewed here, was, and is, that the offense of which he had been convicted was petit larceny, and, under our statutes, not a felony.

We do not think there is anything in this objection. The provision of the constitution makes no exception, and we do not feel at liberty to engraft one upon it. Larceny is larceny, whether grand or petit; and we fail to perceive that the value of the thing stolen, whether a shade above or a shade below the dividing line, can enter into its moral criminality. The *animus furandi* determines the moral aspects of the question.

We can not assent to the proposition, that "the use of the word 'other,' before the generic term 'crime punishable by imprisonment in the penitentiary,' shows that the particular crime of larceny, which disqualifies, is that larceny which is punished by imprisonment in the penitentiary." If that construction be sound, then the principle must equally apply to the other clauses, "malfeasance in office," and "bribery." Some grades of these are not punishable by imprisonment in the penitentiary; yet we think the intention was to visit disfranchisement on every grade of these offenses. Moreover, if the intention had been to disfranchise only convicted felons, it would have been much easier to employ that general and comprehensive term.

The judgment of the City Court is affirmed.

[Russell v. Beasley.]

Russell v. Beasley.*Bill in Equity for Partition of Lands.*

72	190
134	622

1. *Partition of lands in equity; when decreed.*—To sustain a bill in equity for the partition of lands, the complainant must allege, and prove if denied, an undivided interest in the lands, jointly or in common with the defendant; and it is not sufficient to show title in severalty to a distinct portion.

APPEAL from the Chancery Court of Madison.
Heard before the Hon. N. S. GRAHAM.

DAVID P. LEWIS, for appellants.

BRANDON & JONES, *contra*.

SOMERVILLE, J.—We fully concur with the chancellor that the present bill is not sustained by the proof. The suit is one for the partition of lands claimed to be owned by the appellants, as joint owners, or tenants in common, with the appellee, Beasley. The case made by the allegations of the bill presents an undoubted ground of equitable jurisdiction. It is required of the complainants, however, that they should show a clear title to an *undivided interest* in the lands sought to be partitioned.—*Arnett v. Bailey*, 60 Ala. 435; *Horton v. Sledge*, 29 Ala. 478; *Ormond v. Martin*, 37 Ala. 598.

The evidence fails to show any estate *in common* between the complainants and the defendant in the suit, either by way of a joint tenancy, or a tenancy in common. It avails nothing to prove title to a *distinct portion* of the land proposed to be partitioned, for the essence of the estate in common, necessary to be here shown, is that the tenants should “own undivided parts, and occupy promiscuously, because neither knows his own severalty.”—Walker’s Amer. Law (5th Ed.), p. 311.

The evidence offered by complainants may tend to prove title to one hundred and forty acres of the three hundred and sixty acres in controversy; but the defendant also sets up an exclusive claim to the same tract, and the proof is strong in support of his adverse possession of it for such length of time as to make good his plea of the statute of limitations.

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We place the decision of the case, however, upon the first point, which is the one upon which the chancellor seems to have based his decree.

Affirmed.

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Indictment for Rape, and for Carnal Knowledge or Abuse of Female Child.

1. *Sufficiency of indictment; joinder of offenses; election by prosecution.* In an indictment for rape, and for the statutory offense of having carnal knowledge of a female child under ten years of age, or the abuse of such child in the attempt to have carnal knowledge of her (Code, §§ 4304, 4306), it is sufficient to pursue the statutory forms (Nos. 7, 8, p. 992); the offenses may be joined, in different counts, in the same indictment; and the State can not be compelled to elect on which count it will proceed, when the evidence on the trial discloses that the female was over ten years of age when the offense was committed.

2. *Competency of juror.*—A juror is not subject to challenge for cause, merely because he has formed an opinion as to the guilt or innocence of the accused, which may be changed by the evidence: he is disqualified, only "when he has a fixed opinion which would bias his verdict." (Code, § 4881.)

3. *Competency of child as witness.*—A child, between eleven and twelve years of age, being offered as a witness in this case, and being examined by the court to test her competency, "manifested an entire want of instruction as to the nature and effect of an oath, of all religious training, and utter ignorance of the existence of a Supreme Being, the rewarder of truth and the avenger of falsehood;" saying that she had never heard of God, heaven or hell, and did not know that she would be punished, if she swore falsely, otherwise than by being put in jail. *Held*, that the court erred in permitting her to testify as a witness.

FROM the Circuit Court of Marshall.

Tried before the Hon. LEROY F. BOX.

The indictment in this case was found at the April term of said court, 1882, and contained two counts; the first charging, that the defendant, Andrew Beason, "before the finding of this indictment, forcibly ravished Virginia Beard, a female;" and the second, that he "did carnally know, or abuse in the attempt to carnally know, Virginia Beard, a female under the age of ten years." On his trial, having been duly arraigned, the defendant moved to quash the indictment, "because it was vague and indefinite, and charged against him two separate and distinct offenses, and therefore he is unable to plead to said indictment, because of its duplicity and uncertainty;" and this motion being overruled, he then demurred to the indictment,

72	191
100	131
72	191
105	89
72	191
113	30
72	191
135	28
72	191
135	67

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"assigning the same grounds of demurrer as set forth in the said motion to quash." The court overruled the demurrer also, and the defendant then pleaded not guilty; having reserved exceptions to the overruling of his motion and demurrer.

On the trial, during the selection and organization of the jury, as the bill of exceptions recites, "the defendant propounded questions, through his counsel, to J. W. Wedgeworth, one of said jurors, tending to show his incompetency as a juror, because of opinions formed as to the guilt or innocence of the defendant; and asked said Wedgeworth, if the opinion he had formed was of such nature as to require proof to remove it from his mind; to which question said Wedgeworth replied, that his opinion was of such character that it would require evidence to remove it from his mind. The court then proceeded to ask said Wedgeworth the questions set forth in the Code; and when asked by the court, if he had a fixed opinion as to the guilt or innocence of the defendant which would bias his verdict, he answered, *No*. The defendant challenged said juror for cause, under his answers to the said questions propounded to him; which challenge the court overruled, and called on the defendant to pass on said juror, and the defendant declining to say further in respect to said juror, the court directed said Wedgeworth to take his place as a juror; to which ruling and action of the court the defendant then and there excepted."

During the progress of the trial, it appeared from the testimony of the father of said Virginia Beard, and of other witnesses for the State, that the said Virginia was, at the time of the commission of the alleged offense, eleven years and four months old; "whereupon, the defendant moved the court to require the solicitor to elect upon which count of the indictment he would proceed; which motion was overruled by the court, and the defendant then and there excepted."

When said Virginia Beard was introduced as a witness for the State, "the defendant objected to her competency and capacity as a witness; and the court thereupon proceeded to examine and interrogate her, as to her responsibility if she swore falsely. Said Virginia stated, that she would be put in jail if she swore falsely, but that was all that would be done with her. When asked by the court, what would become of her, if she swore falsely, when she died, she replied, '*I will go to rest.*' The court asked her, if she would not be punished by God for false swearing; and she answered, '*No.*' The court asked her, whether she had ever heard of heaven or hell; and she answered, '*No, she had not.*' The court asked her, whether she had ever heard of God or the devil; and she answered, '*No.*' The State's attorney asked her, in the presence of the court, if

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wicked people would not be punished by God when they died; and she answered, '*No, they went to rest.*' Said attorney asked her, if she knew right from wrong; and she answered, that she did. He then asked her, if it was right or wrong to swear a lie; to which she answered, that it was wrong, and that she would be punished if she swore a lie—that she would be put in the jail-house, and would be sent to the penitentiary." The witness was examined at greater length, but the above is the substance of her examination. The defendant objected to her competency and capacity as a witness, and duly reserved exceptions to the overruling of his several objections.

No counsel appeared for the appellant in this court, so far as the record and dockets show; and there is no brief on file.

H. C. TOMPKINS, Attorney-General, for the State.

BRICKELL, C. J.—Each count of the indictment is in the form prescribed by the Code; the first charging the offense of rape, and the second that of carnal knowledge of a female child, under ten years of age, or, in the alternative, the abuse of such child in the attempt to have carnal knowledge of her. Code, §§ 4304, 4306; Forms 7 and 8, p. 992. The offenses are of the same character, and subject to the same punishment; and they may be joined, in different counts, in the same indictment. The motion to quash, and the demurrer to the indictment, were properly overruled. Nor was there any ground for compelling the State to elect the prosecution of the one offense, to the exclusion of the other.—*Dawkins v. The State*, 58 Ala. 376.

2. The juror Wedgeworth was not subject to challenge for cause. It is not the mere formation of an opinion touching the guilt or innocence of the accused, which disqualifies a juror. The statute disqualifies him only when he has a fixed opinion, which would bias his verdict. An opinion, no matter how formed, or upon what it may be based, that is not fixed, that may be changed by the evidence, that will not bias the verdict, will not disqualify.—*Carson v. State*, 50 Ala. 134; *Bales v. State*, 63 Ala. 30.

3. The child injured, at the time of the injury, was above the age of eleven years; and being offered as a witness, the defendant objected to her competency. To ascertain her capacity, she was examined by the court, and by counsel, in the presence, and under the direction of the court. While it can not be said that she manifested a want of understanding common to children of her years, yet she manifested an entire want of instruction as to the nature and effect of an oath, of all re-

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ligious training, and utter ignorance of the existence of a Supreme Being, "the rewarder of truth and the avenger of falsehood." While we agree to the doctrine laid down in *Wade v. State*, 50 Ala. 164, that in passing upon the capacity of children of tender years to testify, much must be left to the sound discretion of the primary court, and that it is only in strong cases the ruling of the court admitting them as witnesses should be reversed, we are constrained by the later case of *Carter v. State*, 63 Ala. 52, to hold the child incompetent, and that it was error to permit her to testify.

Let the judgment be reversed, and the cause remanded; the prisoner will remain in custody, until discharged by due course of law.

Powell v. The State.

Indictment for Grand Larceny.

1. *Disqualification of infamous person as witness.*—A conviction of an infamous offense disqualifies a person as a witness, but the mere finding of a true bill against him does not have that effect.

FROM the Circuit Court of Dallas.

Tried before the Hon. JOHN MOORE.

The defendant in this case was indicted for the larceny of an ox, the personal property of Peter Monk; pleaded not guilty, and was tried on issue joined on that plea. On the trial, as appears from the bill of exceptions, one George Strawbridge being introduced as a witness for the prosecution, "the defendant objected to his examination as a witness, on the ground that he had been indicted for grand larceny, and read to the court the indictment therefor, then pending in said court and undetermined, against said witness." The court overruled the objection, and permitted the witness to be examined; and this ruling is the only matter presented by the bill of exceptions.

No counsel appeared in this court for the defendant, so far as the record and dockets show.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—It requires conviction of an infamous crime to disqualify a witness. The finding of a true bill against him is not enough.—1 Greenl. Ev. § 375; Clark's Cr. Manual, § 2437.

The judgment is affirmed.

[White v. The State.]

White v. The State.*Indictment for Grand Larceny, and Burglary.*

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100	149
72	195
133	149

1. *Averment of ownership of property.*—In an indictment for burglary, where the house broken into and entered belongs to several partners, joint owners, or tenants in common (Code, § 4800; Sess. Acts, 1878–9, p. 46), the ownership may be laid in any one or more of them.

2. *Misnomer; admission implied from silence.*—Issue being joined on the plea of misnomer in a criminal case, it is competent for the prosecution to prove, as an implied admission by the defendant, that he was arraigned and tried in the mayor's court by the same name alleged in the indictment, without interposing any objection on the ground of misnomer.

3. *Same; relevancy of evidence as to custom or usage.*—On the trial of such issue, the alleged misnomer being in the surname of the defendant, who was a young mulatto boy, and whose mother, testifying as a witness for him, was called by the surname of her former owner, and stated that his name was also the same, as alleged in his plea; evidence of the fact that, "after the war, negroes took their surnames from their former owners or masters, and negro children were called by the name of their mother's former owner or master," has no legitimate tendency to prove that the defendant thus acquired his surname, and is not relevant or admissible evidence for him.

4. *Sufficiency of evidence, and charge as to conflict.*—If the jury entertain a reasonable doubt as to the truth or falsity of any material fact constituting a part of the testimony in a criminal case, the defendant is entitled to the benefit of that doubt, however small may be its influence; but this principle does not extend to a conflict in the testimony of two witnesses as to a collateral and immaterial matter.

5. *As to presumption implied from failure to call witness.*—There is no rule of law which requires that, in cases of larceny or burglary, based on circumstantial evidence, the person who last had the rightful or innocent possession of the stolen property must be examined as a witness for the prosecution, or raises a presumption favorable to the defendant's innocence from the failure to examine such person as a witness.

6. *Possession of stolen goods by accused.*—Possession of stolen goods by the accused, even though unexplained and exclusive, does not authorize the inference of his complicity in the larceny or burglary charged, unless it is also recent, or soon after the commission of the offense; and while the word *recent*, in this connection, is not capable of any exact definition, but varies, within a certain range, with the conditions of each particular case, and though there may be cases in which the court may, as matter of law, pronounce the possession recent; yet the question is usually one of fact for the determination of the jury, and a charge which ignores it, or withdraws it from their consideration, is erroneous. (*Overruling Maynard v. The State*, 46 Ala. 85.)

From the Circuit Court of Madison.

Tried before the Hon. H. C. SPEAKE.

The indictment in this case contained two counts; the first charging, that the defendant, "Dixie White, before the finding

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of this indictment, broke into and entered the dwelling-house of Ben. Matthews, with intent to steal;" and the second, that he "unlawfully and feloniously took and carried away a watch, of the value of over twenty-five dollars, the property of Ben. Matthews." The defendant pleaded in abatement on account of an alleged misnomer, averring that his true name was Dixie Wyche, and that he never had been known or called by the name of Dixie White; and issue was joined on this plea. "On the trial of the plea of misnomer," as the bill of exceptions states, "the defendant proved by Parthenia Wyche, that she was his mother, and he was named Dixie Wyche; that she was a slave before the war, and belonged to Dr. A. Wyche, and in this way her son obtained the name of Wyche. Ed. J. Mastin, Wm. Street, and other witnesses for the State, testified that they had known the defendant for several years, as Dixie White; and said Mastin stated, that he had known the defendant to be arraigned and tried in the mayor's court of the city of Huntsville, by the name of Dixie White. To this evidence of said Mastin the defendant objected, but the court overruled the objection, and the defendant duly excepted. On cross-examination, Thos. C. Barclay, a witness for the State, testified that he lived in Marshall and Madison counties, Alabama, for many years before the war, and in one of said counties ever since the war; and the defendant then offered to prove by said witness, that after the war negroes took their surnames from their former owners or masters, and that negro children were called by the name of their mother's former master or owner. The court excluded this evidence, on objection by the State, and the defendant duly excepted. The jury brought in a verdict for the State on the plea of misnomer, and the defendant then pleaded not guilty."

"On the trial, *Ben. Matthews*, a witness for the State, testified that, in April, 1881, he and William Halsey jointly rented and occupied a room over Schaudies' boot-store in Huntsville, from Isham J. Fennell; that he and Halsey each had a key to said room; that said room was broken into during said month, and a watch was taken from a trunk in the room, and that he recovered the watch shortly afterwards; and said witness produced and identified the watch, and described how the door was broken open. *Fred. Howe*, a witness for the State, testified that he was a jeweller in Huntsville; that in April, 1881, a tall, yellow man came into his store, accompanied by the defendant, and handed the said watch to witness, and asked if it was gold; saying that, if there was anything wrong about it,—that he was talking about buying it from the defendant. Thereupon, defendant said, 'You are a liar; you asked me to show you a jeweller's shop, and I came with you.' Witness identified the

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watch as the one produced by said Matthews, and valued it at \$32; did not know the tall, yellow man; sent for a policeman, and defendant was at once arrested at his store. *Henry Hamlin*, colored, a witness for the State, identified the watch as one which he saw the defendant trying to sell on the day of his arrest, at the United States court-house in Huntsville, and testified that the defendant left the watch with one William Miller, colored; that said Miller was going around trying to sell the watch, in the absence of the defendant; that the defendant claimed the watch, and was asking \$5.00 for it before he left it with Miller, and was trying to sell it to a tall, yellow colored man, with round shoulders, who was a stranger. Said *Miller*, colored, a witness for the State, identified said watch as one that the defendant had at the United States court-house, but said that the defendant did not leave it with him, and that he did not go around trying to sell it; that he met the defendant at the depot, on the day before the watch was seen by him at the court-house, and defendant then had the watch. *Mr. Goodwin*, a witness for the State, testified that he was at the defendant's preliminary trial, on the day of his arrest, in April, 1881; that one of the witnesses for the prosecution was a tall, yellow man, with round shoulders, named Hashaw, who was a stranger in Huntsville, and was then attending the United States court as a witness. The defendant objected to all of this evidence about Hashaw, as irrelevant and illegal; and the objection being overruled by the court, the defendant duly excepted. *William Halsey*, mentioned by said Matthews, was sworn as a witness for the State, and was put under the rule, but was not examined. This was all the evidence."

"The court, in its general charge to the jury, said, that 'it was sufficient to allege the house entered to be the dwelling-house of Ben. Matthews, and that although the evidence might show it was also the dwelling-house of William Halsey, the jury could convict, because it was only necessary, in cases of larceny or burglary, to allege and prove one of two or more joint owners.' To this part of the charge the defendant duly excepted. The court charged the jury, also, 'that if it were proved that the defendant had possession of the watch, and they were satisfied by the evidence that it had been stolen, then such possession, if unexplained by the defendant, was sufficient to create the presumption of his guilt.' To this part of the charge, also, the defendant duly excepted."

The defendant asked several charges in writing, which the court refused, and which were as follows:

"1. If the jury find that the evidence of Hamlin and Miller is in conflict on material points, the jury is to determine which of them tells the truth, or whether either of them tells the truth;

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and if they have a reasonable doubt as to whether or not they have spoken truly, the defendant is entitled to the benefit of such doubt.

"2. If Halsey had joint possession of the room with Matthews, and was present in court as a witness for the State, and the State failed to examine him as a witness to prove that the room was not entered with his permission, then the jury is authorized to presume that the entry was made with the permission of said Halsey, and the defendant should not be convicted of burglary.

"3. If the jury find that the room alleged to have been broken and entered was at the time jointly occupied and controlled by said Matthews and Halsey, then the defendant can not be convicted of burglary under the indictment.

"4. If the jury find that Halsey had joint possession of the room alleged to be entered, and of its contents; and that the watch was taken from a trunk in said room; and that Halsey was present in court as a witness for the State, and was not examined as a witness; then the defendant's possession of the watch, if he had it in his possession, does not create the presumption of his guilt.

"5. Before a defendant can be convicted of burglary or larceny on circumstantial evidence, the person who last had innocent possession of the property must be examined as a witness, or the failure to examine him must be accounted for."

Exceptions were duly reserved by the defendant to the refusal of each of these charges; and he now relies on these several rulings of the court, to which, as above stated, he reserved exceptions, as grounds of reversal. The jury, by their verdict, found the defendant guilty of grand larceny; and he was thereupon sentenced by the court to imprisonment at hard labor for the county, for one year.

WALKER & SHELBY, for appellants.

H. C. TOMPKINS, Attorney-General, for the State.

SOMERVILLE, J.—Section 4800 of the Code of 1876, *as amended* by the act of December 4, 1878, provides, that "when *any property*, upon or in relation to which the offense was committed, belongs to *several* partners or owners, it is sufficient to allege the ownership to be in *any one or more* of such partners or owners."—Acts 1878-79, p. 46. The original statute had reference only to *personal* property, and not *real*.—*Harris v. The State*, 60 Ala. 50. The manifest purpose of the amendment is, to extend its operation so as to embrace property of all kinds, whether real, personal, or mixed. It clearly abrogates

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the common-law rule, which required an indictment for burglary to state with precision the name of *each* of several owners of a building, alleged to have been burglariously entered.—*Davis v. The State*, 54 Ala. 88. It is now sufficient to lay the ownership or property in any one or more of such joint tenants, partners, or tenants in common. The indictment conformed to this principle, and was sufficient.—*Williams v. The State*, 67 Ala. 183.

2. Under the issue of *misnomer*, interposed by the defendant, it was competent to prove that he had been arraigned and tried in the Mayor's Court of the city of Huntsville by the name of Dixie *White*. This, if true, was an admission by him of such name, in the absence of objection to it, and tended to prove that he was as well known by that name, as by the name of Dixie *Wyche*..

3. The court below very clearly did not err in excluding the evidence offered by defendant, to the effect that "negroes, after the war, took their surnames from their former owners or masters, and that negro children were called by the name of their mother's former master or owner." This testimony was too uncertain, indefinite, and remote, to come within that class of evidentiary facts regarded as relevant. It had no legitimate tendency to prove the same fact to be true in the particular case of the defendant, especially when as to him it was controverted as the principal issue in the case. It is entirely outside of the influence of the principle permitting evidence of custom or usage. 1 Greenl. Ev. §§ 292 *et seq.*; 2 Whart. Ev. §§ 958 *et seq.*

4. The proposition can not be doubted, that, if the jury entertain a reasonable doubt as to the truth or falsity of any material fact, constituting a part of the testimony in a criminal case, the defendant is entitled to the benefit of such doubt, however small may be its influence. The first charge asked by the defendant did not, however, fall within the purview of this principle. It erroneously assumed, that the witnesses Hamlin and Miller conflicted in their testimony as to a *material fact*. They both stated, that the defendant had possession of the watch alleged to have been stolen; and the only conflict was as to his having left it with the witness Miller, and as to the latter's exertions to sell it; which was a collateral matter entirely immaterial, and in no wise affecting the defendant's guilt or innocence of the crime charged in the indictment. The charge in question is, also, objectionable for ambiguity, and, for this reason, was properly refused.

5. There is no rule of law which requires, in cases of burglary, or larceny, based on circumstantial evidence, that the person, who last had innocent possession of the stolen property, must be examined by the State, and that the failure to examine

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such witness creates any presumption favorable to the innocence of a defendant. Charges numbered five and six, as requested by the defendant, were erroneous in assuming the existence of such a principle, and were properly refused.

6. It is not *every* or *any* possession of stolen goods by a party, which will authorize the inference of his complicity in the crime of larceny or burglary; nor, in fact, every such *unexplained* possession, although it may be *exclusive*, as opposed to the idea of a joint possession with others. Another element is necessary in order to constitute a *guilty* possession. It must be *recent*, or soon after the commission of the offense to which it has reference.—*Henderson v. The State*, 70 Ala. 23; 1 Greenl. Ev. § 34; Whart. Cr. Ev. § 758; Clark's Cr. Dig. §§ 97, 145, 635; *Murray & Bell's case*, 48 Ala. 157, 675; *Crawford's case*, 44 Ala. 45.

What is meant by "recent," is incapable of exact or precise definition, and the term has been said to vary, "within a certain range, with the conditions of each particular case." Whart. Cr. Ev. § 759. There are cases, no doubt, so clear in nature, and undisputed in facts, as that the court could pronounce the possession recent, as matter of law; but the question is usually one of fact for the determination of the jury. Be this as it may, we are of opinion that the charge given by the court on this subject was erroneous, because it excluded from the consideration of the jury a necessary element of a guilty possession—namely, that it should be *recent*; and its vice consisted in assuming that any other kind of possession afforded a just inference of the defendant's complicity in the crime with which he was charged. It is upon the same principle that charges ignoring the question of venue, and withdrawing it from the consideration of the jury, have always been pronounced erroneous.—*Gooden v. The State*, 55 Ala. 178; *Bain v. The State*, 61 Ala. 75. The same is true of a charge ignoring or withdrawing the question of intent to defraud, in an indictment for forgery (*Gooden's case, supra*); or of any material fact which is a necessary constituent of the prisoner's guilt. *Corbett v. The State*, 31 Ala. 330; *McAdory's case*, 59 Ala. 92.

The ruling made in *Maynard's case*, 46 Ala. 85, is not in harmony with these views; and to this extent, the authority of that case must be overruled.

There is nothing in the other exceptions. The judgment is reversed, and the cause remanded for a new trial. In the meanwhile, the prisoner will be retained in custody, until discharged by due course of law.

[Sylvester v. The State.]

Sylvester v. The State.*Indictment for Murder.*

1. *Organization of grand jury; voluntary appearance of juror drawn but not summoned; summons of person not drawn.*—A person who was regularly drawn and selected as a grand juror, but was not summoned, may voluntarily appear, and thereby subject himself to the control of the court as if he had been summoned; and if a person is summoned who was not drawn and selected, and who does not appear, such summons does not work any irregularity in the organization of the grand jury.

2. *Setting day for trial; presumption of continuance.*—If the trial is not begun on the day set for it, but on the next day, the record should properly show a continuance from one day to the other; and when the record is silent, such continuance will be presumed, in the absence of all evidence to the contrary, and of all objection in the court below.

3. *Competency of juror; who is householder.*—A man who provides for his family, and lives with them in a house which belongs to his wife's statutory estate, of which he has control as husband and trustee, is a householder (Code, § 4732), and competent to serve as a juror.

4. *Dying declarations.*—When dying declarations are proved to have been made under a sense of impending death, their admissibility or effect as evidence is not impaired or affected by the fact that the family of the deceased thought at the time that he would recover; and proof of that fact is not relevant or admissible as evidence.

5. *Appearance of defendant's clothing; relevancy as evidence.*—The absence of all appearance of blood on the clothing of the accused, immediately after the killing, is not a fact tending to his exculpation, when it is not shown, or attempted to be shown, that the nature and character of the wound inflicted on the deceased, or the circumstances under which it was inflicted, were such that stains of blood would probably have been found on the person or clothing of the perpetrator of the crime.

6. *Flight of accused; relevancy of evidence.*—The flight of the accused, at or about the time he is accused or suspected, is relevant and admissible evidence against him, "the force of which depends on its connection with other criminating facts;" and as circumstances tending to show such flight, it may be to prove that search was made for him at his reputed residence, and at places to which it might reasonably be presumed he had gone, and that he could not be found.

7. *Conviction of murder in second degree.*—Under an indictment for murder in the usual form (Code, 991, Form No. 2), a verdict of guilty of murder in the second degree is an acquittal of the higher offense; and on a second trial, after the reversal of the judgment of conviction, although the defendant can not be convicted of murder in the first degree, the jury may find him guilty of the second degree on evidence showing his guilt in the first degree, and the court may so instruct them.

8. *Use of deadly weapon; presumption of malice.*—From the use of a deadly weapon, the law infers an intent to kill, or to do grievous bodily harm; and if the circumstances do not show excuse, justification, or immediate provocation, the presumption of malice is conclusively drawn.

9. *Deadly weapon defined.*—A deadly weapon is not one a blow from which would ordinarily produce death, but one from which, as it was used in the particular case, death would probably result; and whether

72	201
96	75
72	201
98	6
98	13
72	201
102	152
72	201
103	55
72	201
110	86
72	201
123	11
124	20
72	201
130	27
72	201
142	296

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the weapon used was, in its nature and character, a deadly weapon, is generally a matter of law for the decision of the court, and not a question of fact for the determination of the jury.

From the City Court of Mobile.

Tried before the Hon. O. J. SEMMES.

The indictment in this case was found at the November term of said court, 1880, and charged the defendant, Nathaniel Sylvester, with the murder of Jeremiah Lynch, "by stabbing him with some sharp instrument, the exact character or description of which is to the grand jury unknown;" or, as alleged in the second count, "by stabbing him with a knife, a more particular description of which is to the grand jury unknown." On a former trial, the defendant was found guilty of murder in the second degree, and sentenced to imprisonment in the penitentiary for ten years; but the judgment was reversed by this court, during last term, and the cause was remanded.

In the court below, there was no objection, so far as the record shows, either to the organization of the grand jury, or to the sufficiency of the indictment; but the record shows that, in the list of persons drawn as grand jurors, and whom the sheriff was ordered to summon, the names of *Benjamin Burke* and *Spotswood Brown* were written between the names of Charles Hopkins and M. Levy; while the sheriff's return, as copied in the judgment-entry, contains only the name of *Benjamin Brown* between the names of said Hopkins and Levy, and the judgment-entry further recites, that *Benjamin Burke* appeared and was excused by the court, and copies the name of *Spotswood Brown* as one of the jurors who appeared and served; and these matters were urged in this court as irregularities in the formation of the grand jury. The defendant was duly arraigned, and pleaded not guilty; and the court thereupon appointed the 31st July, 1882, for his trial, and ordered a copy of the indictment and of the special *venire* to be served on him one entire day before the trial. The next judgment-entry, which recites the trial, is dated the 1st August, and there is no entry or recital showing that the cause was continued from the day before, the day set for the trial; and this was urged in this court as an irregularity, for which the judgment should be reversed.

When the cause was called for trial, as the bill of exceptions recites, "the prisoner and his counsel being present, the court began the organization of the jury; and the name of C. C. Smith being regularly called as one of the special *venire*, he answered on his *voir dire*, that he was not a freeholder, but resided, with his family, in a house which his wife owned; and that he supported his family, and was the head of it, but was not otherwise a householder. The State accepted said Smith as

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a juror, but the defendant challenged him for cause; which challenge the court disallowed, and the defendant excepted."

The deceased was a policeman, and was stabbed while on night duty, in attempting to arrest or disperse a small crowd of disorderly persons, in May, 1872; and he died, from the effects of the wound, several days afterwards. Dr. Savage, the physician who was called to him, was examined as a witness for the prosecution, and testified, among other things, "My opinion, as expressed at my second visit, was, that the wound would prove fatal." Said witness was asked, on cross-examination, "Was that opinion assented to by the family?" The prosecuting attorney objected to this question, and the court sustained the objection; "the defendant having admitted that the deceased, at the time he made the declaration [?], was in a dying condition, and so believed himself to be. The defendant's attorney stated to the court, that he expected to prove by the witness that the family of the deceased did not assent to the opinion, but rejected it, and discharged the witness from further attendance on account of it. The court still refused to allow the witness to answer the question, and the defendant excepted to the refusal. The defendant's attorney then asked the witness, 'Did the deceased and his family assent to your opinion as to the fatality of the wound?' The court sustained an objection to this question, on the ground that the defendant admitted the deceased was in such state as to make his declaration [admissible?], and the defendant excepted."

The defendant was arrested in Pensacola, some time after the commission of the offense (the year and month not being shown), by a policeman named Bressingham, who was introduced as a witness for the State, and who was asked by the solicitor, "Had you looked for the defendant in Mobile at any time previous?" The defendant objected to this question, "as immaterial and irrelevant," and reserved an exception to the overruling of his objection; and the witness answered, "that he had looked for him the morning after Lynch was stabbed, but could not find him." The solicitor then asked, "Where did you look?" and the witness answered, "that he went to a house in Mobile, on the corner of Charleston and St. Emanuel streets, said to be his house, and all over the city, but failed to find him." To this question and answer, each, objections were interposed by the defendant, and exceptions reserved to their allowance.

Jim Dillard, a witness for the defendant, thus testified: "I remember when Mr. Lynch was stabbed. I was standing on the corner of Charleston and St. Emanuel streets, and Nat. Sylvester was over to his mother's house. I heard two shots fired; and he came across the street, and asked me what was the matter. I told him I did not know, but that I had heard

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two shots fired up the street. He asked me to go up there, and I told him I did not care to go. He and Scott Smith then went that way, but soon came back, being gone not more than three or four minutes. I asked them, what was the matter; and he replied, that he did not know—that a policeman was shot, they said, but he did not know. They stayed at my house three or four hours, and then went home, or said they were going home.” The defendant’s attorney then asked the witness, “Was any blood on his clothes?” The prosecuting attorney objected to this question, and the court sustained the objection; to which ruling the defendant reserved an exception.

The court charged the jury, “of its own motion, among other things,” as follows: “Malice may be implied from the use of a deadly weapon; so that, if you find from the evidence that the killing was done with a deadly weapon, you may infer that it was done maliciously. *In determining whether or not a weapon used was a deadly weapon, you may look at the result of the blow, the manner in which the weapon was used, the character of the weapon, and the nature of the wound inflicted. For instance, if a man struck another in the breast, with a knife that had a blade three or four inches long, with so much force as would probably produce death, you might say it was a deadly weapon, and might find him guilty of murder;* while, if the blow was on the hand, and used in such a way as would not probably produce death, you might say the weapon was not a deadly weapon.” To the italicized portions of this charge the defendant duly reserved exceptions, and also to the refusal of a charge asked by him, which was in these words: “Unless the jury believe, from the evidence, that the instrument with which the deceased was stabbed was such that a blow from it would ordinarily produce death, they can not infer malice from the mere fact that the killing was with that instrument.”

The court further charged the jury as follows: “Although you should find, from the evidence, that the defendant is guilty of murder in the first degree, this will not work an acquittal; for, if you find from the evidence that he is guilty of murder in the first degree, you should render a verdict for murder in the second degree.” To the giving of this charge the defendant reserved an exception.

G. L. SMITH, for the prisoner, argued all the points reserved as above stated, and cited the following authorities: *Shorter v. The State*, 63 Ala. 130; *Flinn v. Barber*, 59 Ala. 446; *Hall v. The State*, 51 Ala. 9; *Corbett v. The State*, 31 Ala. 330; *Jordan v. The State*, 52 Ala. 188; 1 Brick. Dig. 809, §§ 81, 82.

H. C. TOMPKINS, Attorney-General, for the State, cited *Aaron* VOL. LXXII.

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v. The State, 37 Ala. 106; Clark's Cr. Manual, § 538; *Hadley v. The State*, 55 Ala. 31; *Ex parte Nettles*, 58 Ala. 268; 1 Whar. Amer. Crim. Law, 712; 4 Barn. & Cr. 255.

BRICKELL, C. J.—We can not perceive that in the organization of the grand jury there was the least irregularity. The fact that two of the persons drawn and selected were not summoned, and yet voluntarily appeared, the one being excused from service by the court, and the other serving, is not an irregularity. Without the service of notice by the sheriff, they could appear voluntarily; and appearing, they were as subject to the duty of jurors, and to the control of the court, as if they had attended in obedience to a summons. If it be true that a person was summoned as a juror, who was not drawn and selected, it is also true that he did not appear, and was not put on the jury.

2. The defendant was present in court when the day for the trial was set. The trial was entered upon on the day succeeding the day set. The presumption from the silence of the record is, that for some sufficient reason the cause was continued over to the day upon which the trial was had. Such a continuance, though not entered on the minutes, as would be more proper, is presumed in the absence of objection and of all evidence to the contrary.

3. The juror Smith was the head of a family, for which he was providing, and who dwelt with him. Though the title to the premises on which he resided may have been in his wife, as her husband and trustee, he had of them rightful possession and control. Within the strictest meaning of the term, he was a householder.—*Aaron v. State*, 37 Ala. 106.

4. Whether the family of the deceased were of the opinion that he would recover from, or die of the wounds he had received, was not a relevant inquiry. It was admitted that his declarations, which were introduced in evidence, were made under a sense of impending death; and the force of the admission, or the weight of the declarations, could not be lessened, because his family were more hopeful, and believed he would recover.

5. The absence of all appearance of blood on the clothing of the accused, immediately after the killing, was not a fact tending to his exculpation. It was not shown, or offered to be shown, that it was probable from the nature and character of the wound, or the circumstances under which it was inflicted, stains of blood would have been found on the person or clothing of the perpetrator. A fact or circumstance not having a tendency, direct or immediate, to the proof or disproof of the mat-

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ter in issue, ought not to be received as evidence.—*State v. Wisdom*, 8 Port. 511.

6. The flight of a person accused of a crime, at or about the time he is accused or suspected, is a fact which may be received in evidence against him. The force of it as criminating him depends upon its connection with other criminating facts. A search for the accused at the place of his reputed residence, soon after the homicide, and at places to which it was reasonably supposed he had gone, connected with the failure to find him, tended to show that he had fled, and was properly received in evidence. *Bowles v. State*, 58 Ala. 335.

7. Under the present indictment, a conviction could have been had for any or either degree of criminal homicide, of which guilt was shown by the evidence.—Code of 1876, § 4904. The former verdict, finding the defendant guilty of murder in the second degree, operated an acquittal of murder in the first degree. The acquittal was final and conclusive, and was not impaired because of the reversal of the judgment of conviction upon appeal to this court.—*Bell v. State*, 48 Ala. 684; *Berry v. State*, 65 Ala. 117. The defendant could be tried again only for the offense of which he had been convicted, and the degrees of criminal homicide included in it. Murder in the first degree includes every element and ingredient of murder in the second degree. In view of the particular circumstances of the case, the instruction of the City Court, that though the jury were convinced of the defendant's guilt of murder in the first degree, of that offense he could not be convicted, but could be convicted of the less offense necessarily involved in it, murder in the second degree, was proper.

8. The law infers from the use of a deadly weapon an intent to kill, or to do grievous bodily harm, because the man must be taken to intend the necessary and usual consequences of his act. And if the circumstances do not show excuse, or justification, or immediate provocation, the presumption of malice is drawn conclusively.—*Hadley v. State*, 55 Ala. 31; *Ex parte Nettles*, 58 Ala. 268. The instructions to the jury upon this point were more favorable to the accused than he could of right demand.

9. The instruction requested by the appellant was properly refused. It referred to the jury, for consideration and determination, the question whether the weapon employed in the killing was, in its nature and character, a deadly weapon; which is, generally, not a question of fact for the jury, but of law for the decision of the court.—2 Bish. Cr. Law, § 680; *State v. Cratcn*, 6 Ired. (Law), 164; *State v. West*, 6 Jones (Law), 505. A deadly weapon is one, not, as asserted in the instruction, a blow from which would *ordinarily* produce death, but one from

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which, as it was used, death would probably result. And an instrument or weapon used in inflicting injuries upon the person of another may or not be esteemed deadly, according to the manner of its use, and the subject on which it is used.—*State v. West, supra*. And in determining, as matter of reason, whether the use of it imports malice, the actual effects produced by it are to be considered. From a consideration of the results of the use of the weapon, and the manner and circumstances of its use, the attention of the jury would have been diverted, if this instruction had been given.

We find no error in the record, of injury to the appellant, and the judgment must be affirmed.

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Bill in Equity by Mortgagor for Redemption and Account.

1. *Argumentative allegations.*—Argumentative allegations in a bill are objectionable.

2. *Allegations of misrepresentations not showing fraud.*—In a bill filed by a stockholder in an incorporated building and loan association, asking an account and redemption under a mortgage which he had executed to the association, averments in these words, “Your orator’s purpose in obtaining said shares of stock in the outset was to enable him to borrow the money, and not as an investment in the stock, and this purpose was well known to the officers of said company; and orator was moved to borrow the money, and pay this \$75 per month, by the statements and calculations made by said officers, and given to him, that this stock would be worth \$200 per share after the one-hundredth installment was paid in, and he became a shareholder by the purchase of stock for the above purpose, and under the foregoing representations,”—show only the expression of an opinion or judgment on a matter which was equally open to both parties, and do not amount to a charge of fraud or willful misrepresentation.

3. *Transcript; copy of opinion on former appeal.*—On a second appeal in a chancery cause, the copy of the former opinion of this court, which was certified to the lower court for its guidance, should not be included in the transcript; and if included, no costs will be allowed for it.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon JOHN A. FOSTER.

The original bill in this case was filed on the 5th January, 1882, by Thomas H. Lake, against the Security Loan Association, a domestic corporation organized under the general statute (Code, §§ 1937–43) in June, 1873; and sought an account and redemption under a mortgage, which the complainant had executed to secure a loan made to him by the associa-

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93	589
72	207
125	482
72	207
180	297
181	376

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tion, and to enjoin a sale of the mortgaged property under a power in the mortgage. Copies of the constitution, or declaration of incorporation, and of the by-laws of the association, were made exhibits to the bill. It was provided by the constitution, among other things, that each stockholder or shareholder should pay one dollar per share, by monthly installments, until the amount paid in, with interest and premiums on loans, should make each share worth \$200, but with a proviso that not more than one hundred installments should be required; and that each stockholder should be entitled to borrow from the association \$200 on each share held by him, by bidding the highest premium on loans at any regular monthly meeting, and securing the loan by a mortgage on real estate, subject to the provisions of the constitution and by-laws. The complainant acquired or purchased twenty-five shares of stock in the association, and procured a loan of \$5,000 on them, at a premium which required him to pay \$50 per month, in addition to his regular monthly installments of \$25, or one dollar per share; and he executed a mortgage to the association, on the 5th April, 1876, to secure the payment of this loan as required by the articles of association. The complainant continued to make his monthly payments, until November, 1881, when he claimed that only about \$400 was due on his debt, which he offered to pay; while the association insisted that the amount due was about \$1,100, and advertised the property for sale under the mortgage. On the filing of the bill, an injunction was granted and issued as prayed. An answer under oath was filed by the association, and also by its president, who was joined with it as a defendant; and a motion was afterwards submitted to dissolve the injunction, and to dismiss the bill for want of equity. The chancellor overruled this motion, and also overruled a demurrer to the bill for want of equity; but his decree was reversed by this court on appeal, at the last term, and the cause was remanded, as shown by the report of the case (69 Ala. 456), where the material facts are stated at greater length.

After the remandment of the cause, the complainant filed an amended bill, in which he insisted that the by-laws of the association were inconsistent with the articles of incorporation, in that they contemplated a continuance of the membership "until the anticipated value of \$200 per share has in fact been attained, when, as he apprehends, no such result can ever be attained, and hence no end to the demands of \$50 per month;" claimed the right to withdraw, and have his loan cancelled, on the terms which he had offered, and which, as he insisted, were in accordance with the constitution of the association; alleged that the accounts were complicated, and that, on a proper accounting, he was not indebted in a greater sum than he had

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offered to pay. The opinion of this court renders it unnecessary to state these, or any other allegations of the amended bill, at length. The chancellor held that the amendments did not obviate the objections taken to the bill on the former appeal, and therefore sustained a demurrer to the bill as amended, on numerous grounds specifically assigned; and his decree is now assigned as error.

JAMES COBBS, for appellant.

H. PILLANS, *contra*.

STONE, J.—Most of the questions raised by the amended bill were considered and decided by us, when this case was before us at a former term.—*Security Loan Association v. Lake*, 69 Ala. 456. We will not repeat what we then said. The frame of the amended bill is objectionable, in that it is, in large degree, argumentative.

One clause in the amendment seeks to raise a question not sufficiently charged in the original bill, and hence not considered on the former hearing. Its language is: "Your orator shows that the purpose of obtaining the 20 [25?] shares of stock in the outset was to enable him to borrow the money, and not as an investment in the stock, and that this purpose was well known to the officers of the company; and that orator was moved to borrow the money, and pay this \$75 per month, by the statements and calculations made by the officers, and given him, that this stock would be worth \$200 per share after the 100th installment was paid in, and he became a stockholder by purchase of the stock for the above purpose, and under the foregoing representations." This was, at most, the expression of an opinion or judgment, on a matter which, it would seem, was equally open to both parties. No willful misrepresentation is charged, nor does it appear that any representation of fact was made. The charge is wholly insufficient to justify relief.—2 Brick. Dig. 14, §§ 16, 21. The decree of the chancellor, dissolving the injunction, must be affirmed.

We feel it our duty to call attention to an irregularity disclosed in the transcript we have been considering. On the former appeal in this case, the decree of the chancellor was reversed; and, pursuant to the statute in such cases, a copy of our opinion thus rendered was certified to the court below, for its guidance. In the present transcript that copy-opinion has been re-certified back to us, thus making it a part of the present transcript, and very materially swelling its volume. That copy-opinion was no part of the record, and should not have been

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embodied in this transcript. The register is entitled to no compensation for that part of the transcript, and none is allowed him.

Affirmed.

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Creditors' Bill to set aside Fraudulent Conveyance, or have it declared General Assignment.

1. *Filing bill in double aspect.*—A creditors' bill can not be filed in a double aspect, asking to set aside a conveyance as fraudulent, or, in the alternative, to have it declared and enforced as a general assignment under the statute (Code, § 2126), enuring to the equal benefit of all the creditors; and the principle applies equally to a general creditors' bill, and to a bill filed by one or more creditors for their own benefit. (Adhering to *Lehman v. Meyer*, 67 Ala. 396, which overruled *Crawford v. Kirksey*, 50 Ala. 590.)

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 17th January, 1882, by James Talcott, "in behalf of himself and all other creditors of the late firm of J. Frenkel & Co., who will become parties complainant hereto, and who will contribute to the costs of this cause," against the persons composing the late firm of J. Frenkel & Co., the partners composing the firm of A. & B. Moog, M. J. Goldsmith, and several other persons; and sought to set aside several conveyances executed by the said Frenkel & Co., individually and as partners, on the ground that they were executed and accepted with the intent to hinder, delay, and defraud their creditors; or, in the alternative, that the several conveyances be construed together, declared and enforced as a general assignment, enuring to the benefit of all the grantors' creditors equally. The defendants demurred to the bill, assigning specifically several grounds of demurrer, the substance of which was, that these alternative averments and prayers were inconsistent and repugnant. The chancellor overruled the demurrer, and his decree overruling it is now assigned as error.

J. L. & G. L. SMITH, and MACARTNEY & CLARKE, for appellants, cited *Gordon's Adm'r v. Ross*, 63 Ala. 366; *Lehman v. Meyer*, 67 Ala. 396; *Micon v. Ashurst*, 55 Ala. 612; *Rives* VOL. LXXII.

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v. *Walthall*, 38 Ala. 332; *Ray's Adm'r v. Womble*, 56 Ala. 32; *Warehouse Co. v. Jones*, 62 Ala. 550.

HANNIS TAYLOR, *contra*.—Admitting the general rule laid down in the cases cited for appellants, and the correctness of its application to bills filed by special creditors; yet this rule can not be applied to general creditors' bills. In each aspect of a general creditors' bill, the foundation for relief is the same—that is, the fraudulent acts of the parties; and the relief prayed is the same—namely, the condemnation of the property to the claims of all the creditors equally. It is a solecism to say that such a bill seeks, in one aspect, to uphold a contract or conveyance, and to annul it in the other. In each aspect, the attempt is to annul the contract made by the parties, and, in its stead, to enforce rights which arise by operation of law. A conveyance which will be enforced as a general assignment, and a conveyance which will be set aside for fraud, are alike fraudulent conveyances, which the statute annuls, in whole or in part, and sets up in their stead rights which the parties attempted to destroy. The ingenious devices of insolvent debtors are manifold, and the facts may be so obscured, as in this case, that a general creditors' bill in a double aspect is the only remedy that can be successfully invoked; and when the assets of the debtor, attempted to be put beyond the reach of his creditors, are thus reached, and condemned to the satisfaction of all his debts equally, no legal principle is violated, and no rule of pleading is infringed.

SOMERVILLE, J.—In *Lehman v. Meyer*, 67 Ala. 396, we held a creditors' bill demurrable, as being repugnant and inconsistent, which was framed in the double aspect of having a conveyance, executed by a debtor, declared, in the one alternative, *fraudulent and void*, because made to hinder, delay or defraud the creditors of the grantor; and, in the other alternative, seeking to sustain the same conveyance as a *general assignment*, enuring equally to the benefit of all of his creditors. This decision expressly overruled the case of *Crawford v. Kirksey*, 50 Ala. 590, in which the opposite conclusion had been reached.

The principle was recognized, as often before declared by this court, that a bill in equity may generally be framed in a double aspect, and will be sustained, in all cases, where each alternative averment would be the foundation for precisely the same relief, and the same defenses are applicable to each. *Gordon's Adm'r v. Ross*, 63 Ala. 363; *Micou v. Ashurst*, 55 Ala. 607; *Rives v. Walthall*, 38 Ala. 329; *City of Eufaula v. McNab*, 67 Ala. 588. But the court further held, that the

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two separate reliefs prayed for, in the dual aspects of the bill, were clearly repugnant and inconsistent; the complainants seeking, in the one alternative, *to destroy the validity* of the conveyance, by having it adjudged an absolute nullity; and, in the other, *to sustain it as valid and legal*, under the provisions of the statute upholding it as a general assignment. The effect, in the one case, is to claim *against* the conveyance, and, in the other, to claim *under* it.—Code, 1876, § 2124; *Rapier v. Gulf City Paper Co.*, 64 Ala. 342; Code, § 2126. We are of opinion that this conclusion is in entire harmony with the previous adjudications of this court, and that the case of *Crawford v. Kirksey*, *supra*, was properly overruled.

It is urged, however, in argument, that this being a *general creditors' bill*, the relief prayed is the same in both alternatives—the condemnation of the debtor's property to the satisfaction of his debts. This is the same argument adopted in support of the conclusion reached in *Crawford v. Kirksey*, *supra*, the reasoning of which was condemned as unsound in *Lehman v. Meyer*, 67 Ala. 396, cited *supra*. The suggestion is based upon a misapprehension of the legal principle involved. There is one sense in which the relief prayed for, in every possible aspect of a bill, is remotely the same—the *collection of the complainant's demand out of the defendant's property*. But the rule under consideration contemplates rather the *immediate legal relief* prayed for, which is the foundation and source of this remote relief. One may, for example, reach the same result by assailing a decree against himself, seeking to *set it aside on the ground of fraud*, and by *reviewing it for error apparent*; yet it has been held that the two aspects united in the same bill would be repugnant and inconsistent.—*Gordon's Adm'r v. Ross*, 63 Ala. 363. So, for a like reason, a bill has been held demurrable, which seeks, in one aspect, to *have a mortgage cancelled*, because executed to secure a debt founded on an alleged illegal consideration, and, in the other, to *establish the mortgage* and redeem the mortgaged premises.—*Micou v. Ashurst*, 55 Ala. 607. A like repugnancy was declared to exist in a prayer for the *enforcement of a vendor's lien* as a valid obligation, and a proposed amendment to the bill praying for a *rescission and cancellation* of the contract of sale as being *void for ultra vires*. *City of Eufaula v. McNab*, 67 Ala. 589. The same principle was recognized in another case, where it was adjudged that the complainant could not seek to have a *will* declared *void* on the one hand; or, else, on the other, *valid*, and to have the lands devised by the will partitioned by decree of the court among those entitled.—*McCooker v. Brady*, 1 Barb. Ch. 329. These several adjudications are strong illustrations of the principle under discussion, and are closely analogous to the case in hand.

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In the present case, not only are the alternative averments of the bill conflicting, and the disjunctive reliefs diametrically repugnant, but there is a manifest repugnancy even in the results of these reliefs. If the conveyance assailed is decreed a *general assignment*, thus being sustained in its legal validity, *all the creditors* of the grantor, whether parties to the bill or not, would be entitled to participate, *pro rata*, in the fruits of the litigation. It would, under the statute, "enure to the benefit of *all of the creditors of the grantor equally*."—Code of 1876, § 2126. If, on the other hand, the conveyance is declared absolutely void for fraud, the *grantee would get no portion of his claim* secured by it, unless there was a remaining surplus, but would forfeit his rights under the instrument because of his participation in the covinous transactions.—Bump on Fraud. Conv. 467, 470. So, too, in the latter case, *those creditors are preferred* who, through their superior diligence, may have obtained a prior lien by filing the first bill. If, in other words, the conveyance be void for fraud, those creditors of the debtor, who file separate bills, obtain a preference regulated by the order of time in which they commenced their suits—he being adjudged to be first in right who was first in time.—*Evans v. Welch*, 63 Ala. 250; *Hone v. Henriquez*, 13 Wend. 240; Bump on Fraud. Conv. 535; 1 Brick. Dig. 655, §§ 217, 222.

The test, in all such cases, is said to be, if a decree *pro confesso* should be taken, could the court, looking merely at the statements of the bill and the confession, grant any certain relief to the complainant.—*Rives v. Walihall*, 38 Ala. 333; *Charles v. Dubose*, 29 Ala. 367. In such event, would it not be "mere matter of speculation and conjecture with the court, as to which of the titles should [in this case] be made the foundation for relief?"—*Lehman v. Meyer*, 67 Ala. 404. No chancellor could reasonably be compelled, in cases of this nature, to search the records of his own, and perhaps of other courts, in order to determine this question of relative priorities and of conflicting liens. The rules of certainty, governing our system of equity pleadings, require that these difficulties should be solved by a mere inspection of the face of the bill; just as we would determine the sufficiency of a demurrer, or of a motion to dismiss for want of equity. So far as concerns the rule under discussion, therefore, we can discern no sound distinction in its proper application to general creditors' bills, and such as are filed in the interest of particular creditors.

The court, in our opinion, erred in overruling the demurrer to the bill; and the decree of the chancellor is reversed, and the cause remanded.

[Eslava v. Farley.]

Eslava v. Farley.*Supersedeas of Execution on Assigned Judgment.*

1. *Parties to petition for supersedeas; liability of assignee for costs.* When a petition is filed for the *supersedeas* of an execution, sued out by an assignee in the name of the original plaintiff, the assignee may be made a defendant thereto; and if he comes in voluntarily as a party, and is unsuccessful in resisting the *supersedeas*, costs may be adjudged against him, under the general statute (Code, § 3128), as the unsuccessful party in a civil suit.

2. *What may be assigned as error.*—A party can assign as error only matters which are prejudicial to him: erroneous rulings, prejudicial to others, but not injurious to him, are not available to reverse the judgment.

3. *Sureties for costs, by party resisting supersedeas of execution.*—There is no statute which requires the assignee of a judgment, when resisting the *supersedeas* of an execution sued out by him in the name of his assignor, to give security for the costs if unsuccessful, or which authorizes a summary judgment against sureties given by him voluntarily; yet he can not assign as error such summary judgment against his sureties, since it is not prejudicial to him.

APPEAL from the Circuit Court of Mobile.

The record does not show the name of the presiding judge.

In this case, as the record shows, an action was commenced in said court on the 6th January, 1871, in the name of John C. Wilson, against Mrs. Celestine Eslava; and a judgment by default was rendered against the defendant in said action, on the 16th January, 1872. From this judgment an appeal was sued out by the defendant, returnable to the June term, 1872, of this court, and an appeal bond given, with Charles Farley and F. H. Aubert as sureties; and the judgment was affirmed by this court, at the same term, with damages and costs, against the appellant and her sureties. On this affirmed judgment an execution was sued out on the 10th February, 1873, against Mrs. Eslava and her sureties on the appeal bond, which was levied on certain real estate in the city of Mobile, as the property of Mrs. Eslava; but the levy was released, and the execution so returned, by the order of the plaintiff. On the 17th March, 1880, said judgment was transferred by the plaintiff therein to Jules Eslava, by written assignment in these words: "For value received, I hereby assign, transfer, and set over this judgment, to Jules Eslava,—I not to be liable for any costs." Another execution was issued on said judgment, on the 23d October, 1880, which was levied on property belonging to said Charles

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Farley; and he thereupon filed his petition for a *supersedeas* of said execution, alleging the facts above stated; also, that the release of the former levy on the property of Mrs. Eslava was made without his knowledge or consent, that the greater part (if not the whole amount) of the judgment was paid before the assignment to Jules Eslava, and was known by him to be paid when he took the assignment, and that the assignment was without consideration.

On the filing of this petition, an order for a *supersedeas* was granted by the presiding judge of the circuit (Hon. H. T. TOULMIN), on the petitioner giving bond as required by law; and the bond was given as required. Thereupon, a petition was filed by said Jules Eslava, the assignee of the judgment, alleging that he was the real and beneficial plaintiff in the judgment, and praying that he be allowed to intervene for his own protection as a defendant to the petition for a *supersedeas*; and he was allowed to intervene and defend, in the name of said Wilson, the plaintiff in the judgment. The record sets out, also, "a bond for costs," executed by said Jules Eslava, with George Eberlein and N. Crane as his sureties, conditioned as follows: "Whereas, Jules Eslava is the transferee of a judgment obtained by John C. Wilson against Charles Farley, surety on the bond of one Mrs. Eslava, and has caused an execution to issue thereon; and whereas, said Farley has petitioned the Circuit Court of said county to supersede said execution; now, if the said J. Eslava shall well and truly pay all costs that accrue against said Eslava or said Wilson, or are adjudged to be paid by them or either of them, by reason of the issue of said execution, or in said cause of said Farley's petition, then this instrument to be void," &c.

The record does not show any order of the court, requiring the execution of this bond, or recognizing it in any way; but, an issue having been formed between said Eslava and Farley, on the averments of the petition for a *supersedeas*, and submitted to a jury, who returned a verdict in favor of the petitioner, the court thereupon rendered a judgment perpetually superseding an execution on the judgment, "and that said Charles Farley have and recover of said Jules Eslava, and of George Eberlein and N. Crane, his sureties, all costs in and about this behalf expended." The appeal is sued out in the names of all the defendants, but errors are assigned by said Eslava alone; the assignments being the rendition of the judgment against him on the verdict, and the summary judgment against Eberlein and Crane as his sureties.

WATTS & SONS, for appellant.

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BOYLES, FAITH & CLOUD, *contra*.

BRICKELL, C. J.—The assignment of the judgment carried with it a right to the assignee to sue out execution, or to sue thereon in the name of the original plaintiff, and independent of his control.—*Harrison v. Marshall*, 6 Port. 65; *Haden v. Walker*, 5 Ala. 86. The assignee, having these rights, and a complete equitable title to the judgment, of which courts of law take notice, could properly have been made a party defendant to the petition for a *supersedeas* of the execution issuing upon it. Coming in voluntarily, making himself a party, and alone entering into a contest of the petition, in which he was unsuccessful, costs were properly adjudged against him. Within the spirit and meaning of the words of the statute, he was the unsuccessful party in a civil action at law, of whom the successful party is entitled to recover costs.—Code of 1876, § 3128.

The assignee, Eslava, alone assigns error. Parties are permitted to assign only such matters as error, which may be of injury to them. Errors not of injury to them, however injurious to other parties who do not complain of them, are not available for the reversal of a judgment.—1 Brick. Dig. 102, § 284. It was erroneous to render judgment against Crane and Eberlein, the sureties of Eslava, for the costs. There is no statute requiring a suretyship for costs in a case of this kind, and, of course, none which authorizes a summary judgment against the sureties, if given voluntarily.—*Garrett v. Fuller*, 36 Ala. 179. They acquiesce in the judgment, and of it the appellant has no cause of complaint.

Affirmed.

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Indictment for Trespass on Crop by Stock.

1. *Permitting stock to trespass on lands inclosed by common fence; character of fence.*—Under the statute which makes it a misdemeanor for any person occupying or cultivating lands under a common fence with others, to “turn stock of any kind into such inclosure, or knowingly suffer such stock to go at large therein, without a sufficient guard to prevent injury to crops” (Code, § 4414), though the inclosing fence should be substantial, it is not necessary that it should be a statutory fence (*Ib.* § 1586).

2. *Same; constituents of offense.*—A conviction can not be had under this statute, on proof that the defendant, acting in good faith, suffered his hogs to range at large in an extensive woodland, adjoining the inclosed lands, whence they made their way into the inclosed lands through defects in the common fence.

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3. *Same; damages and fine.*—The damages inflicted by the stock, which the statute declares "shall be held a part of the penalty imposed by the court, and shall go to the party injured," are not a part of the fine, but are given in addition to the fine.

FROM the County Court of Wilcox.
Tried before the Hon. JOHN PURIFOY.

JOHN Y. KILPATRICK, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

SOMERVILLE, J.—The defendant was convicted in the court below of the offense of *knowingly suffering his stock to go at large* in an inclosure, occupied or cultivated by himself and several others under a common fence, without a sufficient guard to prevent injury to the crops.—Code 1876, § 4414.

The evidence shows that the defendant suffered his hogs to range in an adjoining woodland, consisting of about two thousand acres, which was outside of the common fence. This fence was a very inferior one, in no sense lawful within the statutory definition, being in some places not over a foot high. The stock do not seem to have been kept on the common premises, though they had trespassed thereon previously, and of this fact the defendant had been advised. There is no evidence tending to show that he turned them into the inclosure, but only that he suffered them to range in the wood-land, whence they found their way within the land inclosed by the common fence, by reason of the defects in it.

It is insisted that the common fence here described must be a lawful fence. The statute does not say so, and we can not, therefore, so construe the words. Any substantial fence, lawful or not lawful, in our opinion, comes within the meaning of the statute, if it is used in common by several parties, who together cultivate or occupy a tract or parcel of land, inclosed by such fence. The manifest effect, if not one of the chief purposes of the act of March 8, 1876 (Acts of 1875-76, p. 288), now embraced within the provisions of section 4414 of the Code, was to take cases coming within its influence out of the operation of the previously existing statute, which relieved the owners of stock from liability for trespasses by such stock where they trespassed on lands not inclosed by a lawful fence. Code, § 1587.

But we are also of opinion, that the defendant would not be guilty of knowingly suffering his stock to go at large within the common inclosure, if he in good faith only suffered them to range in the woodland adjacent thereto. Penal statutes must be strictly construed; and such a construction of this act

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would preclude the supposition, that the General Assembly contemplated that its scope should be so sweeping, and its operation so severe, as that here contended for in behalf of the State. It was the joint duty of the defendant and the other co-occupants of the land trespassed on to repair the common fence, and its dilapidated condition was as much the fault of the one as of the others. The primary object of the statute seems to have reference to protection against trespasses from within, rather than from without, although it clearly includes in words any case where one of the joint occupants turns stock of any kind into the inclosure, wherever they may be kept in custody. The stock may, furthermore, have been permitted to run in the woodland, without finding their way into the cultivated land. The fact that defendant suffered them to run at large without the common fence, is not the same as suffering them to go at large within the common fence. The court, in our opinion, erred in refusing to give the charges requested by appellant touching this phase of the statute.

The act under consideration (Code, § 4414) provides, that the party convicted shall be fined "not less than ten, nor more than fifty dollars; and *also* the amount of the damages inflicted by the stock, which damages shall be held as a part of the penalty imposed by the court, and shall go to the party injured." It is insisted that the damages going to the owner must be embraced in, and are intended to constitute a part of the fine. We are clear in the opposite view. The words of the statute plainly mean otherwise. If any doubt remain, it would be solved by the words of the original act, which assessed the fine "*in addition to* the estimated amount of the damages inflicted by said stock."—Acts 1875-6, p. 288.

The judgment is reversed, and the cause remanded.

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Indictment for Arson.

1. *Oath of petit jury.*—A recital in the judgment-entry, in a criminal case, that "the jury was sworn according to law to try the issue joined," does not show a substantial compliance with the statute (Code, § 4765), but negatives the idea that the proper oath was administered.

FROM the Circuit Court of Wilcox.
Tried before the Hon. JOHN MOORE.
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The appellants in this case, Lewis Walker and Cato Sellers, were indicted, jointly with several other persons, at the November term of said court, 1875, for arson, in setting fire to the county jail, where they were at the time confined under criminal charges. At the same term of the court, some of the defendants pleaded guilty to the charge of arson in the second degree, and sentence was pronounced upon them. At the Spring term, 1878, Walker and Sellers were tried on issue joined on the plea of not guilty, and were convicted of arson in the second degree; but the judgment of conviction was reversed by this court, at their instance, and the cause was remanded. *Walker v. The State*, 61 Ala. 30. At the Spring term, 1879, a new indictment was found against Walker and Sellers; and at the November term, 1881, being duly arraigned on the indictment, each of them filed a special plea of former acquittal, setting out the proceedings had under the first indictment; and the issue on this plea being found against them, they then pleaded not guilty. Issue being joined on this plea, as the judgment-entry recites, "thereupon comes a jury," &c., "who, being duly elected, tried and sworn according to law to try the issue joined, upon their oaths" returned a verdict of guilty. On the trial, the defendants reserved a bill of exceptions to several rulings of the court, which it is unnecessary to state.

S. J. CUMMING, for the appellants, argued the points reserved by the bill of exceptions, and insisted that the oath administered to the jury, as shown by the judgment-entry, must work a reversal of the judgment; citing, to this point, *Schamberger v. The State*, and *Allen v. The State*, decided at the last term. 68 Ala. 543; 71 Ala. 5.

H. C. TOMPKINS, Attorney-General, for the State, cited and relied on the following cases: *Piles v. The State*, 5 Ala. 72; *Crist v. The State*, 21 Ala. 137; *McGuire v. The State*, 37 Ala. 161; *Johnson v. The State*, 47 Ala. 9, 60; *Smith v. The State*, 47 Ala. 540; *McNeill v. The State*, 47 Ala. 503; *McCaller v. The State*, 49 Ala. 540; *Bush v. The State*, 52 Ala. 13; *Moore v. The State*, *Ib.* 524; *Mitchell v. The State*, 58 Ala. 417; *Atkins v. The State*, 60 Ala. 45; *Pickens v. The State*, 58 Ala. 364. He insisted that these cases laid down the correct rule, which should be re-established, notwithstanding the later decisions cited for appellant.

STONE, J.—In *Allen v. The State*, and *Schamberger v. The State*, at last term, we ruled that the oath administered to the jury was insufficient in a criminal case. We are not inclined to depart from those rulings, which were but re-affirmations of

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the then later utterances of this court. Nor will we enter upon a re-examination of the question. Inattention in this behalf causes many reversals in this court, and it would probably be well for the legislature to remedy the evil. The conviction in the present case must be reversed.

There is nothing in the other points urged.—*Lockett v. The State*, 63 Ala. 5; *Walker v. The State*, 61 Ala. 30.

Reversed and remanded. Let the defendants remain in custody, until discharged by due course of law.

Underwood v. The State.

Indictment for Larceny of Cow.

1. *Averment and proof of ownership of thing stolen.*—In an indictment for larceny, the ownership of the property or thing stolen must be alleged, or the failure to allege it must be excused by proper averments; and a variance between the allegations and the proof is fatal to a conviction.

2. *Misnomer and variance.*—The mere mis-spelling of a name, whether of the defendant or a third person, does not vitiate an indictment, and is not a fatal variance, unless the difference causes a material change in the pronunciation of the name.

3. *Same; whether question for court or jury.*—Whether one name is *idem sonans* with another, notwithstanding a difference in the spelling of the two, is a question of fact for the determination of the jury, when it arises on the evidence under the plea of the general issue, and not a matter of law for the decision of the court.

4. *Recent possession of stolen goods.*—The possession of stolen goods recently after the larceny, if unexplained, is a criminating fact, from which the jury may infer the defendant's complicity in the larceny; and the question of its sufficiency being for their determination alone, the court may refuse to instruct them that such unexplained recent possession, "without other circumstances tending to show felonious intent, does not amount to proof beyond a reasonable doubt of a larceny committed by the defendant."

FROM the Circuit Court of Perry.

Tried before the Hon. JOHN MOORE.

The indictment in this case charged, in a single count, "that Perry Underwood, *alias* Charley Williams, feloniously took and carried away a cow, the personal property of Ann *Fooley*." The defendant pleaded not guilty, and issue was joined on that plea. On the trial, Mrs. Ann *Fooley* was introduced as a witness on the part of the State, and testified, "that the cow mentioned was her property, and was stolen from her in Dallas county, at her place about four miles from Selma, where her cattle were kept in a pasture; that she was in Selma on the day

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the defendant sold the cow, and had not missed her, until she was told, in Selma, that he had brought the cow to Selma, and had sold her to a butcher; and that when she went home, in the afternoon of that day, she went around her pasture, and found where the fence had been pulled down and the cow taken out. She testified also, on cross-examination, that her name was Ann *Foley*, and was so spelled and pronounced by her, and that she never spelled it *Fooley*. The defendant then moved the court to exclude from the jury so much and such parts of the testimony of the witness as tended to show property in Ann *Foley*, because the indictment alleges the property to be in Ann *Fooley*, and not Ann *Foley*;" and duly excepted to the overruling of his motion. Richard Teague, another witness for the State, testified, that the defendant came to his house in the outskirts of Selma, about ten o'clock at night, the day before he sold the cow in Selma, having the cow tied with a rope, and asked to stay all night, saying that his father had sent him, from Summerfield, to carry the cow to a butcher in Selma; and the butcher in Selma, to whom the cow was sold by the defendant on the next morning, testified to that fact. "This being the substance of all the evidence, the defendant requested the court, in writing, to instruct the jury as follows: 1. 'If the jury believe, from the evidence, that the only evidence of the defendant's guilt is, that he was in possession of the stolen cow, and that he failed to account satisfactorily for his possession, without other circumstances tending to show felonious intention, this does not amount to proof beyond a reasonable doubt of a larceny committed by the defendant.' 2. 'If the jury believe, from the evidence, that the property charged to have been stolen, and alleged in the indictment to be the property of Ann *Fooley*, was in fact the property of Ann *Foley*, the defendant can not be convicted under this indictment.'" The court refused each of these charges, and the defendant excepted to their refusal.

B. F. SAFFOLD, for the appellant, cited *Lynes v. The State*, 5 Porter, 236; *Humphrey v. Whitten*, 17 Ala. 30; *Beene v. Railroad Co.*, 3 Ala. 660; *Gabriel v. The State*, 40 Ala. 357.

H. C. TOMPKINS, Attorney-General, for the State, cited *Page v. The State*, 61 Ala. 16; *Colquit v. The State*, 61 Ala. 48; *Roberts v. The State*, 61 Ala. 401; *Moorer v. The State*, 44 Ala. 16; *Maynard v. The State*, 46 Ala. 85; *Neal v. The State*, 53 Ala. 465; Wharton's Amer. Crim. Law, § 1277.

BRICKELL, C. J.—An indictment for larceny must state the ownership of the property charged to have been stolen, or

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excuse the omission by proper averments. When the ownership is alleged, a variance between the allegation and the proof entitles the accused to an acquittal, though it will not bar a new indictment describing or averring the ownership properly. In this case, the name of the owner of the thing stolen is averred to be *Ann Fooley*, while the evidence was that the true name of the owner was *Ann Foley*, so spelled and pronounced by her, and never spelled or pronounced as *Ann Fooley*.

The mere mis-spelling of the name of the accused party, or of the name of a third person whom it may be necessary to mention, itself will not vitiate an indictment, or produce a fatal variance, unless it is apparent that the mis-spelling causes a material change in the pronunciation or sound of the two names. Whether one name is *idem sonans* with another, is not a question of orthography, but of pronunciation, "depending less upon rule than upon usage;" and when it arises in evidence on the general issue, is a question of fact for the determination of the jury, not for the decision of the court. 1 Whart. Cr. Law, § 597; *Commonwealth v. Donovan*, 13 Allen, 571. The motion to exclude the evidence, and the instruction requested, were but efforts to withdraw the inquiry from the consideration of the jury, and were properly overruled.

The recent, actual, unexplained possession of stolen goods, is a fact from which the jury may infer the complicity of the defendant in the larceny. Whether it is sufficient evidence of guilt, is a question for their determination. There may be cases in which it would stand alone, unconnected with any other criminating fact, and from it the jury would not probably infer guilt. Whether the inference is just and reasonable—whether the fact satisfies the minds of the jury as reasonable men, beyond all reasonable doubt, of the guilt of the accused—the court can not determine. The charge requested upon this point assumes to declare the sufficiency of the evidence, and was an invasion of the province of the jury. There was no error in its refusal.

Affirmed.

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Indictment for Gaming.

1. *Playing cards at public places.*—A room in a house belonging to the proprietor of a hotel or tavern, and used by him at the time for the ac-
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commodation of guests, is appurtenant to the hotel or tavern, and within the statute against playing cards at hotels and other public houses and places (Code, § 4207), although situated on a separate lot, eighty or ninety feet from the hotel, and never before used for the accommodation of guests.

FROM the Circuit Court of Monroe.

Tried before the Hon. WM. E. CLARKE.

H. PILLANS, and C. J. TORREY, for appellant.

H. C. TOMPKINS, Attorney-General, for the State, cited *Johnson v. The State*, 19 Ala. 527; *Huffman v. The State*, 29 Ala. 40; *Moore v. The State*, 30 Ala. 550; *Wilson v. The State*, 31 Ala. 327; *Arnold v. The State*, 29 Ala. 50.

SOMERVILLE, J.—The defendant is indicted for card-playing, in violation of the provisions of section 4207 of the Code (1876). The evidence shows that the playing was done at night, in a room occupied by a guest, or boarder, at a tavern kept by one Watson as proprietor. This room was part of a small tenement, situated about eighty or ninety feet from the tavern, on a separate lot, which was, however, the property of Watson, although it had never before been used as a place in which to lodge guests. It is clear that, under the evidence set out in the bill of exceptions, this room was *appurtenant* to the tavern. It is enough that it was used as a place to lodge one of the guests or boarders in; that it was in close proximity to the tavern, and was owned by the proprietor. It is entirely immaterial, that it had never been before used for such a purpose, or that no extra price was charged for its occupancy, or that it was situated on a separate lot. The fact of being adjacent to the tavern, or hotel, and being used in connection with its business, constituted it so appurtenant as to make it a part of the premises of the proprietor. Any other construction would fail to suppress the mischief sought to be reached by the statute, and would be a wide departure from the previous decisions of this court.—*Moore v. The State*, 30 Ala. 550; *Clark's Man. Cr. Law*, § 1621, *et seq.*, and cases cited on brief of Attorney-General.

There is no error in the charges of the court, and the judgment is affirmed.

[Foxworth v. White.]

Foxworth v. White.

Bill in Equity by Legatees to re-open Settlement of Executor's Accounts, and remove Settlement into Chancery Court.

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99	58
72	224
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72	224
127	212

1. *Keeping estate together under will; whether personal trusts or executorial duties are conferred.*—Testamentary provisions authorizing and directing an executor to keep the estate together for the term of ten years, cultivating the lands with the labor of slaves, and, at the expiration of that term, to sell all the property not specifically bequeathed, and divide the proceeds of sale among the several legatees, construed in the light of the statutory provisions which, in 1863-4, authorized the Probate Court to confer similar powers on executors, do not impose personal trusts upon the executor, but duties and powers strictly executorial, which he could not exercise without the grant of letters testamentary, and which might be exercised by an administrator with the will annexed.

2. *Equitable relief against probate decree.*—When a final settlement of an executor's accounts has been made in the Probate Court, no trusts being involved, and no fraud imputed, a court of equity will not re-open the settlement, unless some special cause for its interposition is shown.

3. *Sale of decedent's lands to pay debts; jurisdiction of court, and conclusiveness of decree.*—The jurisdiction of the Probate Court to order a sale of lands belonging to a decedent's estate, for the payment of debts, attaches on the filing of a petition by the personal representative, showing a necessity for the sale; and when the jurisdiction of the court has thus attached, and an order of sale has been rendered, such order is conclusive as to the insufficiency of the personal assets, and the existence of debts for which the lands are liable, and it can not be collaterally impeached on account of irregularities in the proceedings.

4. *Purchase by executor at his own sale, or from his vendee; when set aside.*—A purchase of lands by an executor at his own sale, whether directly in his own name, or indirectly through the agency of a third person, and whether made under an order of court or a power in the will, will be set aside in equity, at the mere election of the parties in interest if seasonably expressed; but, having made a fair sale to a third person, he may afterwards purchase from his own vendee, and thereby acquire a good title, though the transaction will be jealously scrutinized by a court of equity.

5. *Contracts of executor in carrying on business for estate.*—When an executor continues to carry on, under powers conferred by the will, the business in which his testator was engaged, he is personally liable on his contracts, and persons who deal with him can not charge the estate with his debts; but the estate is bound to indemnify him on account of debts properly incurred in carrying on the business; and, when he is not in default to the estate, the creditors may be subrogated to his right of indemnity; and when this is effected by a private arrangement between the parties, a court of equity will sanction and uphold the transaction.

APPEAL from the Chancery Court of Wilcox.

Heard before the Hon. CHARLES TURNER.

The bill in this case was filed on the 6th December, 1875, by Eliza M. White and others, children of Caleb E. White, de-
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ceased, who, being infants, sued by their mother as next friend, claiming as legatees under the will of Mrs. Eliza F. McNeill, deceased; against Francis G. Foxworth, both individually and as executor, and against his wife and children, and several other persons claiming under or through him; and sought to set aside a settlement of said executor's accounts which had been made in the Probate Court, and to remove his administration of the estate into the Chancery Court; also, to set aside a sale of lands belonging to the estate, at which Robert H. Erwin became and was reported as the purchaser, a conveyance of the lands by Erwin to said F. G. Foxworth, and a subsequent conveyance by Foxworth to R. H. Dawson and others as trustees.

Mrs. McNeill's will, a copy of which was made an exhibit to the bill, was dated the 29th September, 1863, and was regularly admitted to probate in said county, the place of her residence, on the 15th April, 1864. Said F. G. Foxworth, who was the brother of the testatrix, was nominated as executor of the will, and letters testamentary were granted to him on its probate. By the third and fourth clauses of the will, which are copied in the opinion of the court, the testatrix directed that her plantation should be kept up, and cultivated with the labor of the slaves, for the term of ten years; and that, at the expiration of that period, all the property belonging to her estate should be sold, except that portion disposed of in specific legacies and bequests, and the proceeds of sale be equally divided among some of the children of said F. G. Foxworth and the children of said Caleb E. White, who was a nephew of the testatrix. The executor kept up and cultivated the plantation until about the close of the year 1873, having obtained in the meantime several orders from the Probate Court authorizing him to hire laborers to cultivate the lands; and he also sold during those years, under orders of the court, several mules and other kinds of property, for the payment of debts. On the 10th November, 1873, he filed a petition in said Probate Court, alleging that the personal assets of the estate were insufficient for the payment of debts, and asking an order to sell the lands for that purpose. On the 22d December, 1873, the court granted an order of sale as prayed, directing the sale to be made for one-third cash, and the balance on a credit of one and two years, with interest. The sale was made on the 17th January, 1874, and Robert H. Erwin, of the mercantile house of Watson, Erwin & Co., was declared the purchaser, at the price of \$5,100. The executor reported the sale to the Probate Court; and that the whole of the purchase-money was paid in cash; and thereupon the sale was confirmed on the 19th January, 1874, and a conveyance executed to said Erwin as the purchaser. On the same day, January 19th, 1874, Erwin and his wife conveyed

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the lands, by quit-claim deed, on the recited consideration of ten dollars in hand paid, to said F. G. Foxworth, who, on the 22d January, 1874, by a deed in which his wife joined with him, conveyed the lands to R. H. Dawson, E. N. Jones, and R. C. Jones, as trustees, with power of sale, to secure the payment of certain specified debts. The debts specified in the deed were—1st, a promissory note for \$1,679.90, past-due, and payable to Watson, Erwin & Co., signed by said Foxworth as executor, and said to be assumed by him individually; 2d, a debt due to said E. N. and R. C. Jones as partners, for \$600; 3d, a debt due to J. G. Oates, for \$269.48; 4th, a debt due to R. C. Godbold, for \$1,462,—all of which debts were evidenced by promissory notes signed by said Foxworth. These debts not being paid at maturity, the trustees advertised the lands for sale under the deed; and the bill prayed an injunction of this sale.

The bill alleged, that the estate of the testatrix owed but few debts at the time of her death, and had ample personal assets to pay them; that all of those debts were paid before any order was obtained from the Probate Court authorizing the executor to keep the estate together, and to hire laborers to cultivate the lands; that the executor, acting under authority supposed to be conferred by said orders, contrary to the provisions of the will, borrowed money and obtained supplies and advances from the mercantile house of Watson, Erwin & Co., and attempted to charge the estate with the payment of the debts thus contracted; and that these were the principal debts for which the order to sell lands was obtained, and the lands sold. The bill alleged and charged, also, that the sale to said Erwin “was not a *bona fide* sale for \$5,100, as pretended and recited in said deed to him, but, on the contrary, was made by fraud and collusion between said executor and said Erwin to cheat and defraud your orators of their just rights under the will aforesaid; that said deed from said Erwin and wife to Foxworth was not a *bona fide* sale for a valuable consideration, as therein recited, but was made with the intent more fully to carry out said fraud upon the rights of your orators; that said Foxworth and wife had no right to execute said conveyance to said trustees, nor to charge said lands with the debts and trusts therein mentioned; and that said three deeds are parts of one and the same transaction and contrivance to defraud your orators. And your orators charge, upon the advice of counsel, that said executor, under the provisions of said will, became a trustee for the management of said estate, during the ten years it was by the will ordered to be kept together, under the orders and control of this court, and not under said Probate Court; that said several orders of said Probate Court, to contract debts for the hire of laborers,

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and for the sale of said property, were upon matters not within the jurisdiction of said court, and were made in contravention of the provisions of said will, and are null and void;" and that the several defendants, holding and claiming under these orders and conveyances, were chargeable with notice of the complainants' rights, and liable to account to them as trustees. It was alleged, also, "that said executor made several partial settlements, and on the 12th October, 1874, made in said Probate Court a final settlement of his said administration, in which he was erroneously allowed large credits against said estate, to which he was not entitled, and which said court had no authority to allow, including large sums borrowed to carry on said plantation contrary to the provisions made in the will." On these allegations and charges, the complainants prayed that the trustees be enjoined from selling the lands under the deed; that the several conveyances of the land be set aside, and declared null and void; that the several settlements made in the Probate Court be opened, and the errors corrected; that the administration of the estate be removed into the Chancery Court, and there finally settled, with all matters of account growing out of these several matters.

A joint answer, under oath, was filed by Dawson and the other trustees, denying all the charges of fraud or collusion in the transactions impeached by the bill, and thus stating the facts connected with the sale and conveyances of the land: "After the personal property had been sold by said executor, it was found that \$5,100 remained unpaid, and that it would be necessary for the lands to bring that amount, in order that the estate might pay all its debts; and it was then agreed among the creditors, that the lands, if they did not bring that much, should be bid off to R. H. Erwin for that sum, who should hold them as trustee for the creditors; and if he could not sell them for the amount of his bid, he should then make the best disposition of them he could for the benefit of the creditors. The lands were then offered for sale, and were bid off to said Erwin, under said agreement, there being no other bid, although there was a large crowd present. Said Erwin was not present at the sale, and, when he was informed of it, he objected to what had been done, but, being urged by the other creditors, he consented to accept the trust which they had conferred upon him. The creditors then gave Foxworth receipts for the amounts which the estate owed them respectively, which receipts were taken by him as money. He then reported the sale, and the payment of the purchase-money by Erwin, and, by order of the court, executed and delivered to him a deed for the lands. Afterwards, but on the same day, Erwin proposed to Foxworth that he (F.) should buy the lands, as he was the largest creditor, and attempt

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to work out the other debts. We were present at the interview between them. Foxworth objected to buying the lands, because, as he said, he had made bad crops for a series of years, and had no means to go on; but, upon Erwin's promise that Watson, Erwin & Co. would advance to him, he agreed to take the lands. Erwin and wife then executed a deed to him, and he executed the deed of trust to these respondents." The same account of these matters was given in the answer of Foxworth, also under oath; and he denied all the charges of fraud, insisted on the regularity and validity of all his official acts, and set up as conclusive the settlements made in the Probate Court.

Copies of the several conveyances, and of all the proceedings had in the Probate Court in connection with the sale of the lands and the orders for keeping the estate together, were made exhibits to the bill. No testimony was taken by either party, but the cause was submitted for final decree on the pleadings and exhibits. The chancellor held the complainants entitled to relief, and rendered a decree for them as prayed in their bill; and this decree is now assigned as error.

COCHRAN & DAWSON, and E. W. PETTUS, for appellants.

S. J. CUMMING, *contra*. (No briefs on file.)

BRICKELL, C. J.—The first and second items of the will of the testatrix contain specific bequests. The third and fourth items read as follows: "*Item third*. My will and desire is, that the balance of my negro property, mules, stock of all kinds, mill, gin, &c., which I now or may hereafter own at my death, shall be kept together on my plantation, for the term of ten years, and used and worked thereon; and the moneys therefrom, after paying the expenses of the same, to go to the education of all my beloved brother F. G. Foxworth's children, except Dudley, Ellen and Cordelia." "*Item fourth*. It is further my will and desire, at the expiration of ten years, all my real estate of every character and description, together with all my personal and perishable property, not specifically hereinbefore given and bequeathed to Ellen and Cordelia Foxworth, shall be sold and equally divided between the children of F. G. Foxworth (except Ellen and Cordelia), and the children of my nephew Caleb E. White." The principal question now presented is, whether by these items of the will testamentary trusts were not created, and powers were not conferred, converting the executor into a trustee, and excluding the jurisdiction of the Court of Probate to take cognizance of his administration of them.

The statute, in very general terms, confers on the Court of
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Probate original jurisdiction of "the settlement of the accounts of executors and administrators."—Code of 1876, § 691. The duties of these representatives, in the course of administration, are, in many respects, defined and declared, and there are many powers they may, by the decree of the Court of Probate, be authorized to exercise, which could not have been devolved upon them by any court at common law, and which, if conferred by will, created trusts strictly of equitable cognizance. Though the grant of jurisdiction to the Court of Probate is expressed in general terms, there is a class of cases, involving testamentary trusts and powers, in which it has not jurisdiction to settle the administration of an executor. This class of cases can not, perhaps, be very accurately described. In *Harrison v. Harrison*, 9 Ala. 478, it was said, the Orphans' Court, the predecessor, and of like jurisdiction with the Court of Probate, could not take jurisdiction of trusts created by will, "when the litigation is between the *cestuis que trust* and the executor as trustee; or, in other terms, when the executor, in addition to his powers in that capacity, is also invested with a discretion, and confidence is reposed in him as trustee." In all the cases bearing upon this question, which have been regarded as excepted from the general jurisdiction of the court to settle the accounts of executors or administrators, there was, by the will of the testator, the union in the same person of the relations of trustee and executor—different and distinct rights and duties meeting in him. The trusts distinguishable from the executorial duties, involving discretion, were personal, and most generally of such a character that they could have been assumed and executed, if the executorship had not been accepted. *Portis v. Creagh*, 4 Port. 232; *Leavens v. Butler*, 8 Port. 380; *Billingsley v. Harris*, 17 Ala. 214; *Harrison v. Harrison*, *supra*; *Ex parte Dickson*, 64 Ala. 188.

The keeping of estates together by executors or administrators, under orders of the Court of Probate, especially when the estate consisted of a plantation—of lands, slaves, stock, farming utensils, implements and appliances—at the time the will of the testatrix was executed, and for a long period prior thereto, was a policy favored by the statutes; and testamentary provisions for the same purpose were of frequent occurrence. The sales of lands, or of personal property, for partition between legatees or devisees, it was a duty of the executor (not having power under the will) to obtain an order of the Court of Probate to make, when otherwise an equitable partition could not be effected. It was in view of the policy and usages then prevailing, that the testatrix devolved upon her executor the duty of keeping her estate together for the same period the statutes empowered the Court of Probate to authorize it to be kept to-

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gether, and, upon the expiration of that period, the duty and power of making sales of it to effect distribution to her legatees. The duties and powers are executorial—they are not mere naked trusts resting in personal confidence. These powers could not have been exercised until after the probate of the will, nor without an acceptance of the office of executor. Resulting from the office of executor, and charged upon the executor as executor, an administrator *cum testamento annexo* would have succeeded to them. For the general rule is, that the duties of an executor resulting from the nature of his office, and charged upon him as executor, devolve on an administrator *cum testamento annexo*, where the authority is not necessarily connected with a personal trust or confidence reposed in him by the testator.—*Farwell v. Jacobs*, 4 Mass. 634; *Commonwealth v. Forney*, 3 Watts & Serg. 353. We are of the opinion, the jurisdiction of the Court of Probate to settle the administration of the executor was plenary—that there are no trusts involved of which it could not take cognizance and enforce.

2. The jurisdiction of the court having attached, a final decree having been passed, embracing the subject-matter of the bill, so far as relief is claimed because of the administration of the executor, in the absence of fraud, or some other special cause for interposition, a court of equity can not intervene and reopen the settlement.—*Waring v. Lewis*, 53 Ala. 615; *Otis v. Dargun*, *Id.* 178.

3. The petition for the sale of lands avers the insufficiency of the personal property for the payment of debts,—the fact upon which the jurisdiction of the Court of Probate to order a sale depended. The jurisdiction attached upon the filing of the petition, and errors or irregularities, if any occurred, in the course of the proceedings, will not affect the validity of the decree of sale, when drawn in question collaterally.—1 Brick. Dig. 939, §§ 353-55. It can not now become a matter of inquiry, fraud not being imputed, whether the debts or any of them, for the payment of which the sale was decreed, were properly and legally chargeable on the lands. In the rendition of the decree, the Court of Probate, having jurisdiction, is presumed to have adjudged every fact necessary to its validity. That there were debts, to the payment of which the lands were subject; and that the personal assets were insufficient for their payment, were facts adjudged and determined, and finally adjudged and determined.—*Florentine v. Barton*, 2 Wall. 210; *Lanford v. Dunklin*, 71 Ala. 594.

4. It can not now be doubted, that a purchase by an executor, either directly or indirectly, at a sale made by himself, whether he sells under an order of court, or under a power in a will, will be set aside absolutely at the mere election of par-

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ties in interest, seasonably expressed. An exception to the general rule was, at an early day, applied to an executor or administrator having an interest, purchasing chattels at his own sale, for full value, if the sale was fairly conducted.—*Brannan v. Oliver*, 2 Stew. 47; *Julian v. Reynolds*, 8 Ala. 680; *McLane v. Spence*, 6 Ala. 894; *McCartney v. Calhoun*, 17 Ala. 301; *Montgomery v. Givhan*, 24 Ala. 568; *Andrews v. Hobson*, 23 Ala. 219; *Charles v. DuBose*, 29 Ala. 367. Whether the exception should be applied to sales of chattels only, has not been decided; though it was said in *Calloway v. Gilmer*, 36 Ala. 358, the court was not inclined to the limitation. It is not necessary now to consider that question; for the executor was without any interest, which would have brought him within the exception, if the sale had been of chattels. Nor was he the purchaser at his own sale, but a subsequent purchaser from the purchaser, immediately after the sale. After a fair, actual sale to a third person, a trustee may buy of his own vendee, and the purchase will be free from the infirmity of a purchase made at his own sale, and he will acquire a title the *cestuis que trust* can not impeach. The transaction will, however, be jealously scrutinized by a court of equity; all circumstances of suspicion attending it must be neutralized, by clear and convincing evidence, and every presumption of indirection must be repelled. *James v. James*, 55 Ala. 525. Taking the answers as true, there was a fair, actual sale of the lands under the decree of the Court of Probate, at which a purchase for the value of the lands was made in the name of Erwin. It was not then contemplated that there should be a re-sale to the executor. The re-sale was a subsequent, independent transaction, into which the executor was reluctant to enter, and was only induced to enter upon promises of aid in cultivating the lands in the future, to enable him to repay the debts, which he had accepted in payment of the purchase-money. If these facts be true, all suspicion is removed from the transaction, and all presumption of indirection is repelled. The cause was heard on bill and answers, without testimony; the oaths of the respondents to the answers were not waived, and they must be taken as true, so far as responsive to the bill.—Code of 1876, § 3786.

5. A testator has a power of disposition almost unlimited, as to so much of his property as is not necessary for the payment of his debts. The rights of creditors not being infringed (and as to them the provisions of the will are presumed to have been intended to be subordinate), he may, if he does not offend positive law, or a well known public policy, make that disposition of his estate he may choose; and it can not be avoided though it may to others appear to be manifestly unwise, injudicious, or capricious, or unjust, or ungenerous.—*Atwood v.*

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Beck, 21 Ala. 590. The business or trade in which he may be employed, is not, by operation of law, transmissible to his personal representative, except to a very narrow, limited extent; and a continuance of it by the representative is a breach of duty, from which only liability and loss to him can result. The testator may authorize its continuance; and if it is authorized, and the executor assumes to exercise the power, he renders himself personally liable for debts he may contract in the continuance of the business.—*Ex parte Garland*, 10 Vesey, 119; *Morrow v. Morrow*, 2 Tenn. Ch. 549. Those with whom he deals, can not proceed directly against the estate of the testator. The estate is bound, however, to the indemnity of the executor for all debts and expenses properly incurred in the continuance of the business, when the continuance is in the exercise of a power conferred by the will, or under the authority of a court of competent jurisdiction. If he is not in default—if he is not, on a just settlement of his accounts, indebted to the estate; if the debts incurred by him are in truth advances properly made by him in the prudent exercise of the power, the creditors dealing with him have an equity to be subrogated to his right of indemnity from the trust estate.—*Steele v. Steele*, 64 Ala. 438, and authorities cited. Assuming it to be true that the purchase-money of the lands was paid largely by the payment of debts the executor had incurred in keeping the estate of the testatrix together under the power conferred by the will, or under the orders of the Court of Probate (which we are inclined to regard as superfluous and unnecessary), the necessity and propriety of the expenditures, for which the debts were contracted, was matter which could have been litigated on the final settlement of the executor in the Court of Probate. The decree of the court rendered on the settlement, until it is successfully impeached for fraud, or reversed by an appellate court, is a conclusive adjudication of the necessity and propriety of these expenditures, and that for them the executor was in advance to the estate.—*Waring v. Lewis*, *supra*; *Otis v. Dargan*, *supra*. A court of equity would have subrogated the creditors to the right of the executor to indemnity for the advances. The parties, by the arrangement, simply accomplished that which a court of equity would have decreed; and that it was their right and duty to do without the delay and expense of litigation.

The decree of the chancellor is not consistent with these views; and it must be reversed, and the cause will be remanded.

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d118	640

Actions against Married Woman, on Contracts made after Removal of Disabilities of Coverture by Decree of Chancellor.

1. *Removal of disabilities of coverture by decree of chancellor; extent of powers conferred by decree.*—Under the provisions of the statute approved February 10th, 1875 (Code, § 2731), chancellors are authorized, either in term time or vacation, on the filing of a proper petition and regular proceedings had under it, "to relieve married women of the disabilities of coverture, as to their statutory and other separate estates, so far as to invest them with the right to buy, sell, hold, convey and mortgage real and personal property, and to sue and be sued as *femmes sole*;" but a decree rendered under this statute removes the disabilities of coverture only to the extent particularly specified in the statute, and does not confer on the petitioner the power to make general contracts.

2. *Same; averments of petition.*—When a petition is filed under this statute, it must allege that the petitioner has a separate estate, statutory or equitable; and the omission of such averment, it being a jurisdictional fact, renders the entire proceeding void.

APPEALS from the Circuit Court of Perry.

Tried before the Hon. JOHN MOORE.

These several cases (*Wollner, Hirschberg & Co. v. Cohen, Maas & Bloch v. Cohen*, and *J. Pollack & Co. v. Cohen*), involving the same questions, were argued and submitted together. Mrs. Caroline M. Cohen, the defendant in each case, was a married woman, the wife of Meyer Cohen, whose disabilities of coverture had been removed by a decree of the chancellor, under the general statute (Code, § 2731); and the plaintiffs' debts in each case, on which their respective actions were founded, were contracted by her, in the purchase of goods from them, after the rendition of that decree. Each of the actions was commenced by attachment, sued out on the ground that the defendant was fraudulently disposing of her property; and each was levied on a stock of goods and merchandise, with which she was carrying on business in her own name, in Uniontown in said county. The defendant moved to dissolve the attachment in each case, and filed pleas in abatement on account of her coverture; which motion and plea were overruled by the court. The declaration alleged, in each case, that the defendant was relieved of the disabilities of coverture, on her own petition, by a decree of Chancellor AUSTILL, rendered on the 4th September, 1875, before the debts with plaintiffs were contracted; and there was, in each case, a demurrer to the

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complaint, and a motion to strike it from the files, both of which were overruled and refused. The decision of this court renders it unnecessary to notice these several rulings. The trial was had on issue joined on the plea of *non assumpsit*.

On the trial, as the bill of exceptions shows, the plaintiffs read in evidence a certified transcript of the proceedings had in the chancery cause, under which the defendant was relieved of the disabilities of coverture. The petition in said cause was filed in the Chancery Court of Mobile, on the 8th of September, 1875, and was in these words: "The petition of Caroline M. Cohen shows, that she is a resident and citizen of the city and county of Mobile, in the State of Alabama; and she files this her petition, by her next friend, Henry Kaufman, for the purpose of being relieved from the disabilities of coverture, and made a free-dealer, according to the laws of the State of Alabama, she being a married woman, and that she be invested with the right to buy, sell, hold, convey and mortgage real and personal property, and to sue and be sued as a *femme sole*, and to be declared a *femme sole* for the purposes aforesaid; that her husband is named Meyer Cohen, and he is a citizen and resident of Mobile city and county, in the State of Alabama; that your petitioner has been his wife for many years, and he is willing, and consents in writing, that this her petition shall and may be granted and decreed by your honor. Wherefore, your petitioner prays that your honor will decree and order that your petitioner be relieved from the disabilities of coverture, and be declared a *femme sole*, with the right to buy, sell, hold, convey and mortgage real and personal estate and property, and to sue and be sued as a *femme sole*; and your petitioner, as in duty bound, will ever pray."

On the same day, the assent in writing of the petitioner's husband, to the prayer of the petition, was filed; and the chancellor thereupon rendered the following decree, dated "At chambers, in vacation, Mobile, Sept. 4th, 1875:" "This is a petition of Mrs. Caroline M. Cohen, a married woman, by her next friend, Henry Kaufman, to be relieved of the disabilities of coverture for certain purposes, and comes on to be heard in vacation. It appears that Meyer Cohen, the husband of the petitioner, files his written consent that his wife, the petitioner, may have the relief prayed for. Wherefore, upon consideration, it is ordered, adjudged and decreed, that the petitioner, Caroline M. Cohen, be, and she is hereby, relieved of the disabilities of coverture, so far as to invest her with the power to buy, sell, hold and convey and mortgage real and personal property, and to sue and be sued as a *femme sole*. It is further ordered, that the petitioner and her next friend pay the costs of this petition," &c.

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When this transcript was offered in evidence on the trial, the defendant objected to its admission as evidence, "because said petition did not allege that the petitioner owned or possessed any separate estate whatever at the time said petition was filed, and because the chancellor's decree did not and could not authorize the said defendant (petitioner) to fasten any personal liability on herself;" which objections the court overruled, and the defendant excepted. The plaintiffs proved, also, in each case, the contracts which were the consideration of the debts sued for, being goods sold and delivered by them to defendant, at various times, subsequent to the rendition of said decree; while the defendant adduced evidence showing that, at the several dates when the goods were sold and delivered, "she was conducting a general merchandising business in Uniontown, and said goods were sold to her by plaintiffs for the purposes of trade."

On the evidence adduced, all of which is set out in the bill of exceptions, the court charged the jury, that they must find for the plaintiffs, if they believed the evidence; and refused to charge the jury, on the written request of the defendant, "that the chancellor's decree did not authorize the defendant to engage in a general merchandise business, or to bind herself personally for goods purchased in the usual course of trade." To the charge given, and to the refusal of the charge requested, the defendant duly excepted.

The rulings of the court on the pleadings and evidence, and in the matter of charges given and refused, are now assigned as error.

THOS. SEAY, BROOKS & ROY, and J. W. BUSH, for appellant. (1.) The statute under which the decree was rendered, here set up as the foundation of the defendant's liability, was intended to enable a married woman to utilize her separate estate, by removing some of the restrictions imposed by existing statutes; and it can only be invoked by a married woman who owns a separate estate, statutory or equitable. The petition in this case did not allege, and there was no attempt to show, that Mrs. Cohen owned any estate whatever; and the want of this jurisdictional averment renders the proceeding void. (2.) A decree rendered under this statute, if founded on a sufficient petition, does not enable a married woman to bind herself personally by her contracts, nor to engage in business in her own name as a merchant.—*Hatton v. Weir*, 19 Ala. 127; *Dreyfus v. Wolfe*, 65 Ala. 496; *Davis v. Millett*, 34 Maine, 429; *Slover v. Alcoll*, 11 Mich. 471; *Bank v. Partee*, 99 U. S. 325; *Williams v. Hayward*, 117 Mass. 532. (3.) If Mrs. Cohen holds any estate under the decree, it is a separate estate; and whether

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it be statutory or equitable, this action must fail. If her estate be equitable, it can only be subjected by bill in equity; and if statutory, it can not be reached by attachment.—*McMullen v. Lockwood*, 64 Ala. 56; *Lee v. Ryall*, 68 Ala. 354.

PETTUS & DAWSON, and MACARTNEY & CLARKE, *contra*. (No brief on file.)

STONE, J.—Amending a former statute, the legislature, by act approved February 10, 1875 (Pamph. Acts, 194; Code of 1876, § 2731), enacted: “That the several chancellors in this State, either in term time or in vacation, are hereby authorized and empowered to relieve married women of the disabilities of coverture, as to their statutory and other separate estates, so far as to invest them with the right to buy, sell, hold, convey and mortgage real and personal property, and to sue and be sued as *femmes sole*, whenever the wife, by her next friend, shall file her petition in the Court of Chancery for the district in which she resides, praying that she be decreed, for the purposes aforesaid, to be declared a *femme sole*.”

Interpreting this statute by its own language, we find the purpose of the enactment was, to relieve married women of the disabilities of coverture; not to relieve them of such disabilities in all respects; but only so far as those disabilities affect their “statutory and other separate estates.” And as to separate estates, the relief granted to them is not unlimited. They are not made free-dealers. The relief from marital disabilities is, and can extend only, “so far as to invest them with the right to buy, sell, hold, convey and mortgage real and personal property, and to sue and be sued as *femmes sole*.” None of these rights or powers could a married woman exercise at common law; nor, under our statutes, known as the “woman’s law,” could she exercise any of them, except to sue and be sued in her own name; and even that right was confined to her statutory separate estate. She could hold property, real and personal, but it vested in her husband as her trustee. She could neither buy, sell, nor convey, without the concurring assent and act of her husband. The statute empowered her, when relieved, to do these enumerated acts as a *femme sole*, without the concurrence, and against the consent of her husband.

In *Dreyfus v. Wolfe*, 65 Ala. 496, we were required to pronounce on one phase of this statute. We said: “It can not be successfully gainsaid, that as far as the statute extends, Mrs. Dreyfus is clothed with all the civil powers of a *femme sole*, and her coverture opposes no obstacle to the assertion of rights and liabilities, whether made by her or against her. The rulings

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of this court, from the very commencement, have been, that our statutes, securing to married women their separate estates, do not constitute them *femmes sole*, or free-dealers. They are under all the disabilities of coverture, except to the extent the statutes confer powers on them. The clauses conferring on them powers, we have construed as enabling; we have sometimes said, narrowly enabling. The act of February 10th, 1875, was evidently conceived in the same spirit—that of enabling the wife to do what, theretofore, she had no power to do. It does not, in general terms, constitute her a free-dealer, or confer on her all the powers of a *femme sole*. . . . It does not confer the power to make general contracts.”

We have seen no reason for departing from this interpretation of the statute. So, in *Ashford v. Watkins*, at the last term (70 Ala. 156), speaking of this statute, we said, it “is a delegation to the chancellor, not to the Chancery Court, of a power that prior to its enactment the General Assembly had reserved to itself, not delegating it to any judicial officer. In the absence of the statute, the chancellor could not exercise the power. . . . The power conferred is not the general, prerogative power the General Assembly had been accustomed to exercise, of removing entirely the disabilities of coverture, or of removing only partially, or of investing them with capacity to make particular contracts, or to make particular dispositions of property. The power is precisely defined, and is, ‘to relieve married women of the disabilities of coverture, as to their statutory and other separate estates, so far as to invest them with the right to buy, sell, hold, convey and mortgage real and personal property, and to sue and be sued as *femmes sole*.’ This is the power, and there seems to have been much of legislative caution in the expression. A general capacity to contract is carefully withheld. The only contracts authorized, are such as touch and concern property.” There is then a reference to, and an approval of the doctrine declared in *Dreyfus v. Wolfe*, 65 Ala. 496.

The statute under discussion is certainly enabling. It creates a new jurisdiction, not before exercised by the Chancery Court, and authorizes the chancellor to exercise that jurisdiction, “either in term time or in vacation.” It is a mere statutory power, outside of the general routine of judicial proceedings; and, to be valid, the statute must be strictly conformed to. What are the essentials to put this statutory jurisdiction into exercise? The petitioner must be a married woman. The statute provides for none other. She must have an estate, for the powers of the chancellor can be invoked and exercised only in reference to her estate. The estate must be separate, either statutory or otherwise. Such is the statute, and

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the chancellor's power is confined by the statute to that description of estate. We say, she must have an estate. Courts pronounce on existing rights, and existing conditions; not on future possibilities. A petition under this statute, averring that the petitioner had no estate, statutory or otherwise, would certainly be demurrable. The chancellor would not pronounce judgment on a mere abstraction, or imaginary case. A real subject of judicial inquiry must be before the court. A proceeding to obtain the judgment of the court as to a right of property, when there is no such property in existence, is certainly an anomaly. The statute requires that such petition shall pray that the petitioner "be decreed, for the purposes aforesaid, a *femme sole*." The purposes aforesaid are, relief from "the disabilities of coverture as to her statutory and other separate estates." How can she be under disabilities, when she has no estate? And how can the chancellor confer on her powers over that she has not, and never may acquire?

The petition found in these records, under which it is claimed Mrs. Cohen was relieved of the disabilities of coverture, is fatally defective in substance, and did not put this statutory power of the chancellor into exercise. It entirely omits to aver she had any estate of any kind, statutory or otherwise; and thus fails to show she was entitled to the relief the statute offers. A failure to make a jurisdictional averment, in statutory proceedings like this, is equivalent to an admission that there is no fact on which to base such averment. The chancellor never having acquired jurisdiction, the whole proceeding was and is void.—*Ashford v. Watkins*, *supra*; *Tyson v. Brown*, 64 Ala. 244; *Wyman v. Campbell*, 6 For. 219; 2 Brick. Digest, 464, §§ 1, 6.

It results from what we have said above, that Mrs. Cohen never was empowered to enter into contracts of purchase, and her plea of coverture was a perfect defense to these actions.

Other very grave questions, arising under the act of February 10th, 1875, have been argued before us. What we have said above renders their decision unnecessary.

Reversed and remanded.

[Nordlinger v. Gordon.]

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1. *What defects in process are available to claimant.*—On a statutory trial of the right of property, the claimant can not take advantage of any defects or irregularities in the process which render it merely voidable at the instance of the defendant; but, if the process is void on its face, he may defeat the plaintiff's claim by setting up such invalidity.

2. *Notary public; power to issue attachment.*—A notary public, who is also *ex officio* a justice of the peace, has no power or authority to issue an attachment returnable to the Circuit Court.

APPEAL from the Circuit Court of Perry.

Tried before the Hon. S. W. JOHN, an attorney of the court, selected by the parties on account of the disqualification of the presiding judge.

This was a statutory trial of the right of property in and to three bales of cotton, between F. J. Gordon, plaintiff in attachment against Ivey Fuller, and A. S. Nordlinger as claimant. The plaintiff's attachment was issued by R. W. Nicolson, a notary public, and *ex officio* justice of the peace, and was returnable to the Circuit Court. The claimant moved to dissolve the attachment, on the ground that it was void for want of authority in said Nicolson to issue it; and the overruling of this motion is, with other matters, now assigned as error.

BROOKS & ROY, for appellants.

BRICKELL, C. J.—The claimant, in a trial of the right of property, can not take advantage of defects or irregularities in the process levied on the property which render it merely voidable. These are available only to the defendant in the process, upon some direct proceeding for its vacation or abatement, and are not subject to be inquired into collaterally, either by a party or a stranger to the process. But, if the process is on its face void, not authorizing the seizure of the property, the claimant is entitled to take advantage of its invalidity.—*Brown v. Hurt*, 31 Ala. 146; *Matthews v. Sands*, 29 Ala. 136. The issue between the claimant and the plaintiff is, the liability of the property to the process. If the process is void on its face, the property can not be liable to seizure under it, and the plaintiff can have no right to its condemnation, whatever may be the right

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of the claimant to it. When the process is not void, the claimant must succeed on the strength of his own title—he can not be permitted to defeat the levy, and support his own claim, by showing that the title resided in any other person than himself. 2 Brick. Dig. 480, § 67. But, when the process is void, a different question arises. It is only a plaintiff in an execution or attachment capable of levy on the property, who can enter into the trial, and form with the claimant the issue, whether the property is liable to the process.

The attachment levied upon the cotton, of which the trial of the right of property was claimed, was issued by a notary public, and *ex officio* justice of the peace, returnable to the Circuit Court. We have heretofore decided, that such a notary is without power or jurisdiction to issue an attachment returnable to the Circuit Court.—*Vann & Waugh v. Adams*, 71 Ala. 475. The writ is consequently void, and should, on the motion of the appellant, have been quashed.—*Stevenson v. O'Hara*, 27 Ala. 362; *Mattheus v. Sands*, 29 Ala. 136. As this conclusion is probably decisive of the case, it is unnecessary to consider the other assignments of error.

Reversed and remanded.

Wiggins v. Newberry.

Petition by Widow for Assignment of Dower.

1. *Dower; when widow, having separate estate, is not entitled to.*—When it is shown that the value of the husband's lands does not exceed \$350, and that the widow owned, at the time of her husband's death, lands worth more than \$100 as her statutory estate (Code, § 2715), she is not entitled to dower.

APPEAL from the Probate Court of Monroe.

IN the matter of the petition of Mrs. Abigail S. Wiggins, the widow of James Wiggins, deceased, for an assignment of dower in the lands which belonged to her said husband at the time of his death. James Wiggins died in July, 1869. The petition was filed in September, 1882, and was contested by some of the heirs. On the evidence adduced, all of which is set out in the bill of exceptions, the court held that the petitioner was not entitled to dower, and therefore dismissed her petition; and this ruling and decree, to which an exception was reserved, is now assigned as error.

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S. J. CUMMING, for appellant.

D. S. NEVILLE, *contra*.

STONE, J.—The testimony bearing on the question of value of the lands, in which dower is claimed, fixes it at from two hundred and fifty, to three hundred and fifty dollars. The intestate leaving children, the widow's claim of dower would be a life estate in one-third of the land in value. Conceding the highest valuation—\$350—the value of one-third of it in fee would be \$116.67. Mrs. Wiggins herself testifies, that at the time of her husband's death she owned an interest in the claim on Dees, for lands sold to him in which she had an interest, on which she realized \$100, after her husband's death. She afterwards realized an additional sum, not fully stated, but probably \$100 more. Looking alone to the first collection of one hundred dollars, which was her separate estate, and owned by her at her husband's death, it is manifest the absolute ownership of that sum was of greater value than a mere life estate in \$116.67. The Probate Court did not err in dismissing the petition for dower.—Code of 1876, § 2715; *Billingslea v. Glenn*, 45 Ala. 540.

We have taken no account of the cattle, because the testimony leaves us in doubt whether they belonged to the husband or the wife. At all events, she had the benefit of them.

What we have said relates to the claim of dower. It may be that the widow is entitled to homestead exemption during her life, in eighty acres of the land, under the constitution of 1868. Art. 14, §§ 2, 3, 5.

Ex parte Dunklin.

Application for Mandamus in matter of Habeas Corpus.

1. *Proceedings before justice of the peace, under warrant of arrest.* When a person is arrested on a charge of vagrancy, or other offense of which a justice of the peace has jurisdiction (Code, § 4628), and brought before a justice for trial, it is the duty of the justice, unless the defendant demands a trial by jury, "to determine both the law and the facts, and award the punishment which the law may demand" (§ 4697); but, if the defendant demands a trial by jury, the justice has no jurisdiction to try him, but is required to bind him over to appear at the next term of the Circuit (or City) Court, to answer the charge (§ 4695), and, on his failure to give bond as required, to commit him to the county jail until the next term of said court.

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2. *Habeas corpus*; who not entitled to.—A person who is in the county jail, under a *mittimus* issued by a justice of the peace, before whom he was brought on a charge of vagrancy, and, demanding a trial by jury, was required to give bond for his appearance at the next term of the Circuit Court, and committed to jail on failing to give such bond, is not entitled to the writ of *habeas corpus*.

IN this case, Prince Dunklin applied by petition and motion to this court for a writ of *mandamus*, to be directed to Hon. JONA. HARALSON, the presiding judge of the City Court of Selma, commanding him to issue a writ of *habeas corpus* as prayed by the petitioner, to inquire into the legality of his imprisonment in the county jail of Dallas. The petition, with the accompanying papers, alleged and showed that, on the 27th March, 1883, the petitioner was arrested on a charge of vagrancy in abandoning his family, on a warrant issued by a justice of the peace, founded on an affidavit made by Jincey Dunklin, his wife; that "when brought before the justice for trial, and before any trial proceedings had been commenced, petitioner demanded a trial by jury;" that said justice thereupon, "without any examination of witnesses or other evidence," as the petition alleged, required him to enter into bond in the sum of \$100, with two good sureties, conditioned for his appearance at the next term of the Circuit Court of Dallas county to answer the charge, and committed him to jail on his failure to give such bond; that the petitioner then applied to Judge Haralson for a writ of *habeas corpus*, contending that he was illegally restrained of his liberty; and that the writ was refused by Judge Haralson. The *mittimus* of the justice was addressed to the jailor, and in these words: "Prince Dunklin, charged with the offense of vagrancy in abandoning his family, demands a jury; you are therefore commanded to receive him into your custody, and detain him until he is legally discharged by law." A copy of this *mittimus* was made an exhibit to the petition for the writ of *habeas corpus*; and a copy of that petition, with the refusal of Judge Haralson to grant the writ, was made an exhibit to the petition to this court. The proceedings had before the justice are only shown by the allegations of the petition.

B. F. SAFFOLD, for the petitioner.

STONE, J.—The offense with which the prisoner was charged is a misdemeanor, and the statute confers on justices of the peace jurisdiction to try and punish persons guilty of the offense, unless, before entering on the trial, the accused demands a trial by jury.—Code of 1876, §§ 4628, 4696. And on such trial the justice "must determine both the law and the facts, without the intervention of a jury, and award the pun-

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ishment which the offense may demand.”—*Ib.* § 4697. If convicted, the defendant has the right of appeal.—*Ib.* § 4700. Now, all these provisions relate to cases where the offender is brought before the justice, not for preliminary examination, but for final trial and judgment of guilty or not guilty. The justice, for such trials, is constituted a criminal court of *oyer and terminer*, with jurisdiction concurrent with that of the County Courts.—*Ib.* § 4628. If, when brought before the justice, the accused desires it, he may demand a trial by jury in the first instance; and if he does, the jurisdiction of the justice to determine the law and facts is at an end.—*Ib.* § 4695. The statute defines what is then the duty of the justice. He must require the accused “to enter into bond, with good sureties, conditioned for his appearance at the next term of the Circuit or City Court of the county, to answer the charge; and, failing to give such bond, must be committed to the county jail,” &c. This is a complete and entire system within itself, independent of, and different from preliminary proceedings before a justice as a committing magistrate.—*Sale v. The State*, 68 Ala. 530. When a jury trial is claimed in such case, the justice hears no testimony, and pronounces no judgment on the probabilities of the defendant’s guilt. He performs his whole duty, when he fixes the penalty, and approves the bond; or, failing to obtain it, commits the accused to prison for safe custody. This commitment is not as punishment, but to secure the appearance of the defendant to answer the charge to be preferred against him. It is not unlike the proceeding when one, brought up for preliminary trial, obtains an adjournment of the hearing until a later day, on account of absent witnesses, or for some other cause; or, perchance, the continuance may be granted at the instance of the State. In either case, the accused, if he desire his liberty, can not complain of an order requiring him to give bond for his appearance, and, failing, that he remain in custody. And yet all this takes place before any testimony is heard. Code, § 4673. See, as to preliminary proceedings before a magistrate, Chapter 4, Title 3, Part 5, commencing with section 4647 of the Code.

There neither had been, nor could there have been, any preliminary examination in this case. The demand of a jury trial had precluded such examination, till the session of the Circuit or City Court at which the accused was required to appear.

In support of the petition, we are referred to *Ex parte Mahone*, 30 Ala. 49; *Ex parte Burnett*, *Ib.* 461; and *Ex parte Champion*, 52 Ala. 311. In each of those cases, there had been a preliminary examination and commitment by a magistrate. Neither of those cases is an authority against the views expressed above. The case *Ex parte State, ex rel. Brooks*,

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51 Ala. 60, shows nothing bearing on the subject presented by this record.

The petitioner shows no right to the writ of *habeas corpus*, and the prayer of his petition must be refused.

Motion denied.

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Indictment for Burglary.

1. *Sufficiency of indictment, in description of building, goods, &c.*—An indictment which charges that the defendant, with intent to steal, “broke into and entered the store of J. H., in which goods or merchandise, things of value, were at the time kept, for use, sale, or deposit” (Code, § 4343), is sufficient, without any further averment of the value of the goods.

2. *Confessions; when voluntary and admissible.*—A confession by a person accused is not necessarily voluntary and admissible, because the person to whom it was made testifies that he used no promises nor threats to induce a confession; nor, on the other hand, is it rendered involuntary and inadmissible, because the person to whom it was made, not being an officer, or in authority, exhorted him to speak the truth, or told him that it would be better (or best) for him to tell the truth.

3. *Same.*—The witness in this case, testifying to the prisoner’s confessions while in custody, said that he used no promises nor threats to induce a confession, but added: “I said to him, ‘You have got your foot in it, and somebody else was with you; now, if you did break open the door, the best thing you can do is to tell all about it, and to tell who was with you, and to tell the truth, the whole truth, and nothing but the truth.’ I wanted to produce the impression on his mind that it was best for him to tell all about it, and I did produce that impression before he would tell me.” Held, that the confession ought to have been excluded.

4. *Interrogating accused on preliminary examination.*—The practice of examining or interrogating an accused person, by the magistrate, pending the preliminary investigation or examination, is unwarranted by the principles of the common law, is not authorized by any existing statute, and is contrary to the spirit of the constitutional provision which declares that no person shall be compelled to give evidence against himself; and statements or confessions made by the accused, in response to questions thus propounded by the magistrate, are not competent evidence against him.

FROM the Circuit Court of Madison.

The material facts in this case are stated in the opinion of the court. The transcript of the record has never come into the hands of the reporter.

WALKER & SHELBY, for the appellant.

H. C. TOMPKINS, Attorney-General, for the State.

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SOMERVILLE, J.—In the case of *Henderson v. The State*, decided at the last term, we held, that where an indictment, framed under section 4343 of the Code of 1876, describes the specific class of articles mentioned in the statute as kept in certain described buildings, for use, sale, or deposit, as “goods,” or “merchandise,” no averment need be made that they are valuable, the statute itself conclusively presuming that they are so. But, if the thing deposited is alleged to be *anything else* than goods or merchandise, it must be averred to be valuable, although its particular value in dollars and cents need not be stated. The present indictment charges, that the defendant “broke into and entered the store of J. H. Hawkins, in which goods or merchandise, things of value, were at the time kept, for use, sale or deposit, with intent to steal.” This was clearly sufficient.—*Henderson’s case*, 70 Ala. 23; *Norris v. The State*, 50 Ala. 126; Clark’s Cr. Dig. § 86, and cases there cited.

The confessions made by the prisoner to the witnesses Cornutt and Lawler, should, in our opinion, have been excluded as evidence. True, it is stated by these witnesses, that they made no threats, or promises, by which to educe such confessions. This, however, is but the statement of a mere opinion, and not of a fact, as the evidence imports otherwise. The witness Lawler testifies as follows: “I said to him (defendant), ‘*You have got your foot in it, and somebody else was with you. Now, if you did break open the door, the best thing you can do is to tell all about it, and to tell who was with you, and to tell the truth, the whole truth, and nothing but the truth.*’ I wanted to produce the impression on his mind, that it *was best for him to tell all about it*, [and] *I did produce that impression before he would tell me.*” This was said in presence of the witness Cornutt, who, as constable, held the defendant under arrest at the time.

It is no doubt the sounder doctrine, that a mere adjuration to *speak the truth*, addressed to a prisoner, will not authorize a confession induced by it to be excluded, where no threats or promises are applied.—Whart. Cr. Ev. §§ 647, 652, 654; *Aaron v. The State*, 37 Ala. 106. Nor can a promise, or inducement, be implied from the exhortation that it is *best or better to tell the truth*, it having been frequently so adjudged.—*King v. The State*, 40 Ala. 314; *Aaron’s case*, 37 Ala. 106; Whart. Cr. Ev. § 647; 2 Lead. Cr. Cases, 189. But the rule is otherwise, where the party has been told, by a person in authority, that it is better for him to confess, or that he will be bettered by saying a particular thing.—1 Phil. Ev., 4th Amer. Ed., 542-3; Whart. Cr. Ev. §§ 651, 654; 1 Whart. Amer. L. § 686.

The exhortation to the prisoner did not stop with adjuring him to tell the truth, or only with telling him that the best

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thing he could do was to tell all about it, in the event he was guilty of the breaking. It goes further, by assuming his guilt, and by assuming also that the prisoner was accompanied by one or more accomplices; and he is told, in effect, that it would be best for him to tell all about these assumed facts. The manifest impression produced on the prisoner's mind must have been, that he would, in some unknown manner, fare better by confessing his guilt of the crime of burglary; and this inducement vitiates any confession evoked under its influence. Whart. Ev. § 651; *State v. York*, 37 N. H. 175; *Vaughan v. Com.*, 17 Grat. 576; Clark's Man. Cr. L. § 2948.

If we are to understand from the bill of exceptions, that the confessions testified to by the witness Lawler, in detail of the alleged burglary, followed the above inducement, or were elicited by it, as we think is its correct construction, these confessions were improperly admitted to go before the jury.

A question of more interest and practical importance remains yet to be considered. It relates to an alleged confession, or statement, made by the defendant during the progress of a preliminary investigation before a magistrate. During the trial, a satchel was produced, containing some of the goods taken from the storehouse which was alleged to have been burglariously entered. *The magistrate, thereupon, interrogated the prisoner, asking him if he knew anything about these goods, or the satchel exhibited to him*. The prisoner answered, that the satchel was like one owned by him, which he had thrown into a field the night of the burglary, and which was proved to be found where the prisoner said he had thrown it. This occurred before the justice had rendered his decision, in the presence of twenty or thirty spectators, who were attending the trial, and after the regular witnesses had been examined. It appears in evidence, that the prisoner was a negro, a former slave, and without education, and he was entirely without the aid or advice of counsel. This statement was allowed to be given in evidence, as a voluntary confession by the defendant, in the trial of this cause before the Circuit Court; and this ruling of the court is assigned for error.

The practice of examining the accused is known to have been authorized, as a familiar and odious procedure in the Roman jurisprudence, and still exists in many parts of continental Europe. The maxim of the common law, however, was, *Nemo tenetur prodere seipsum*; and, therefore, as observed by Mr. Greenleaf, "no examination of the prisoner himself was permitted in England, until the passage of the statute of Philip and Mary."—1 Greenl. Ev. § 224. This statute was amended by 11 and 12 Vict., c. 42, and 14 and 15 Vict., c. 93, and has been reproduced, with various modifications, in some of the

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States of the American Union. These statutes protect the rights of the accused, by many wise and humane safeguards, unnecessary to be here considered.—Whart. Cr. Ev. § 666. An enactment existed in this State, at its earliest history, authorizing such an examination, by requiring the justice to “proceed” to take the *voluntary* information of the accused in writing. This law now no longer exists, having been long since expunged from our statute-books by legislative repeal or amendment.—Aikin’s Ala. Dig. p. 116, § 14; Toulmin’s Laws Ala. 219.

The authority to make an examination of a defendant, under these acts, would seem to imply an authority on the part of the justice to put questions to him as to the facts proved against him. Such was the construction of the English statutes above alluded to.—2 Phil. Ev. (Cow. H. & E.) p. 241; 2 Lead. Cr. Cases, (B. & H.) 201. Mr. Greenleaf, in commenting on these statutes, says: “The manner of the examination is, therefore, particularly regarded, and if it appears that the prisoner had not been left wholly free, and did not consider himself to be so, in what he was called upon to say, or did not feel himself at liberty wholly to decline any explanation or declaration whatever, the examination is not held to have been voluntary.”—1 Greenl. Ev. § 225. A good reason for this conclusion, probably, is found in the suggestion of the same author, elsewhere, that a prisoner, who is subjected to an *inquisitorial examination*, especially when he is unaided and unprotected by the presence of counsel, has his mind so oppressed by his calamitous situation, as to be brought under “the influence of disturbing forces against which it is the policy of the law to protect him.”—1 Greenl. Ev. § 226. Unless a prisoner, under such circumstances, comprehends his rights fully, and is informed by the court that his refusal to answer the questions propounded could not prejudice his case, or be construed as an evidence of guilt, any responsive confessions, implicating him in the crime charged, must, in our opinion, be regarded as involuntary.—Whart. Cr. Ev. §§ 668–9; *State v. Rorie*, 74 N. C. 148; 1 Greenl. Ev. § 215, note 4; *Rex v. Greene*, 5 C. & P. 312; *Murphy’s case*, 63 Ala. 1.

This subject is discussed, at some length, in the learned work of Mr. Best on Evidence; and he severely condemns the *practice of judicial interrogation*, prevailing under the continental systems of jurisprudence, as being entirely unauthorized by the common law, and contrary to the maxim that no person is bound to criminate himself, now imbedded, perhaps, in the Bill of Rights of every American Constitution. “What our law prohibits,” says Mr. Best, “is the *special interrogation of the accused*—the converting him, whether willing or not, into a

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witness against himself; assuming his guilt before proof, and subjecting him to an interrogation on that hypothesis.”—2 Best Ev. § 557. It is manifest to our view, that such a power, once admitted, is liable to unlimited abuse. Though it might serve, in some cases, to extract the truth, it might be exercised with great harshness, so as to wring out of a prisoner evidence of his own accusation, of the truth of which, to say the least, there would exist a serious doubt. It is a power not judicial, but essentially inquisitorial, and, on the whole, prejudicial to the administration of justice. It is justly observed by the same author from whom we have quoted, that, “in short, *judicial interrogation*, however plausible in theory, *would be found in practice a moral torture*; scarcely less dangerous than physical torture of former times, and, like it, unworthy of a place in the jurisprudence of an enlightened country.”—2 Best Ev. § 558. It is enough to say, that the practice is unwarranted, in our opinion, by the principles of the common law, and unauthorized by any existing statute in this State. It is, furthermore, contrary to the spirit of our Declaration of Rights, providing that the accused shall not be “compelled to give evidence against himself”—itself a mere embodiment of a principle of the common law.—Const. 1875, Art. 1, § 7. Confessions, elicited by such a censurable practice, are to be taken as involuntary, and should be excluded as criminative evidence against the person making them.

The judgment is reversed, and the cause remanded.

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Statutory Detinue for Mule.

1. *Ratification of agent's unauthorized act.*—An exchange of a mule for a horse having been made without authority by an agent, a claim and assertion of right and title to the horse by the principal, made with knowledge of the facts, is a ratification of the unauthorized exchange, and is irrevocable.

2. *Conversion by bailee; when bailor may sue.*—If the hirer of a mule exchanges the animal for another during the term, without the consent or authority of the owner, this is a conversion, for which the owner may at once terminate the bailment; and he may sue for his mule before the expiration of the term of hiring.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. JOHN MOORE.

This action was brought by R. W. Atkinson, against D. P.
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Jones, to recover a mule named *John*, of the alleged value of \$60, with the value of the hire or use thereof during the defendant's detention; and was commenced on the 19th May, 1879. On the first trial of the cause, the plaintiff had a verdict and judgment; but the judgment was reversed by this court, and the cause was remanded.—*Jones v. Atkinson*, 68 Ala. 167. After the reversal, a second trial was had on issue joined, as before, on the plea of *non detinet*; and the plaintiff reserved a bill of exceptions, in which the facts are thus stated:

“On the part of the plaintiff the following evidence was introduced: That in February, 1878, plaintiff hired a mule named *Jerry* to one John Pritchett, for the term of one year; and in July, or August, 1878, said mule was swapped, by consent of plaintiff, for a mule named *John*, which was taken and held by said Pritchett in lieu of said mule *Jerry*, on the same terms, and for the same length of time. It was also agreed between plaintiff and said Pritchett, at the time the mule *Jerry* was hired to said Pritchett, that if said Pritchett should, during the term of the hiring, pay plaintiff \$90, said mule was to belong to Pritchett; and they had the same understanding as to the mule *John*. Pritchett never paid for the mule, and only paid part of the hire. Some time during the fall of the year (1878), Pritchett traded the mule *John* to one Clanton, for a mare known as the *Clanton mare*; and plaintiff's evidence showed that this trade was made without his knowledge or consent. Plaintiff's evidence showed, also, that said Pritchett, after he had traded for said mare, took her to plaintiff, but he refused to receive or accept her in lieu of the mule *John*; that Pritchett afterwards traded said mare to one Drinkard, for a mule named *Beck*, claiming said mare at the time as his own property, and so stating to said Drinkard while they were trading; that plaintiff had nothing to do with this trade, and knew nothing of the trade or the mule *Beck*; that said Pritchett afterwards took the mule *Beck* to plaintiff, and asked him to take said mule and try her, and to take her in place of the mule *John*; that the plaintiff refused to do this, but did try the mule, and afterwards returned her to the place where Pritchett lived, and left her there; that plaintiff has never since had or claimed the mule *Beck*, nor has said mule been in his possession, but it was seen in the possession of said Pritchett's father-in-law and brother-in-law, in Clarke county, Alabama; that Pritchett traded said mare to Drinkard, for the mule *Beck*, in December, 1878, or January, 1879, and told Drinkard at the time that the mare was his property, and that no one had any claim on her; that afterwards, when plaintiff saw said Drinkard in possession of said mare, he told Drinkard that he (D.) had traded for his (plaintiff's) property; but that,

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in saying this, plaintiff was only joking. It was proved on the part of the defense, by the testimony of said Drinkard on cross-examination, that plaintiff told him, after he had traded said mule Beck for said mare, that he had traded for his property, in trading for the said mare, *but that it was all right*. The defendant introduced, also, evidence showing that Pritchett traded the mule *John* for the *Clanton mare* in August, 1878; that Clanton traded said mule *John* (the subject of this suit), in September, 1878, to said defendant. One J. L. Adams testified, also, that in October, 1878, he offered to trade a mule to plaintiff, for the mare plaintiff was then riding; and that plaintiff told him, he did not wish to trade said mare, but that he had a mare in the possession of said Pritchett, which he supposed witness well knew as the *Clanton mare*, and would trade her for witness' mule; and that, if witness would name a day, he would send for said mare, and have her at his house, and would trade her to witness for his mule. One McCall testified, also, that while Pritchett had said mare in his possession, and before he had traded her to said Drinkard, Pritchett expressed a desire to trade her to McCall for a mule; that they did not trade, because Pritchett required witness to pay \$10 to boot; and that soon afterwards, on meeting plaintiff, who inquired why the trade had not been made, and was told that he (witness) was not able to pay the \$10 demanded, plaintiff told him that he (plaintiff) would have to pay the boot, and was willing to do so, and told witness to '*go ahead and make the trade*,' and that he would pay the ten dollars boot. The defendant testified for himself, that after he had traded for said mule *John*, in the latter part of September, 1878, he remained in the quiet possession of said mule until in March, 1879, and never heard of plaintiff's setting up any claim to said mule until he was sued. This was, in substance, all the evidence in the case.

"Plaintiff's counsel argued, in his closing speech to the jury, that plaintiff, having hired the mule to Pritchett for a year, had no right to demand or recover the mule, from the person to whom Pritchett had traded it, until after the expiration of the year for which Pritchett had hired it, even if Pritchett had traded it before the expiration of that time. The defendant asked the following charges to the jury, which were in writing, and to the giving of which exceptions were duly reserved by the plaintiff:

"1. That if the jury believed, from the evidence, that the plaintiff ratified the trade of *Jerry* for *John*, and that afterwards, when Pritchett traded *John* for the *Clanton mare*, and while said mare was in the possession of said Pritchett, plaintiff claimed said mare as his property, and himself offered to trade

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her, this was, in law, a ratification of the trade of *John* for said mare, and plaintiff can not recover in this suit.

"2. That if the jury believed, from the evidence, that the plaintiff, after the trade of *John* for the *Clanton mare*, claimed said mare, and offered and attempted to exercise acts of ownership over her, this was a ratification of said trade, and, when once made, could not be revoked, unless made under a misapprehension of the facts.

"3. That if the trade of *John* was made before the expiration of the term for which he was hired, plaintiff had such an interest in said mule as would have entitled him to sue for said mule at any time after said trade, provided he had refused to ratify said trade."

These several charges are now assigned as error.

S. J. CUMMING, for appellant.

JNO. Y. KILPATRICK, *contra*.

BRICKELL, C. J.—The only assignments of error in the present record are based on three charges, given by the court at the request of the defendant. The first and second of these charges present substantially the same question; and that question was directly passed on by this court when this cause was before us at a former term, and was then decided adversely to the plaintiff.—*Jones v. Atkinson*, 68 Ala. 167. We are satisfied that the conclusion then reached is correct; and we, therefore, hold that the Circuit Court did not err in giving these charges.

2. As a fact tending to show that the plaintiff had ratified the trade made by his bailee, Pritchett, by which he exchanged the mule in controversy for the "*Clanton mare*," the defendant testified, that he was in the quiet possession of the mule, from the latter part of September, 1878, until some time in March, 1879; and that he never heard that the plaintiff claimed the mule, until this suit was commenced. To avoid, no doubt, the force of this evidence, the plaintiff's counsel, as stated in the bill of exceptions, argued before the jury, that, as he had hired the mule to Pritchett for a year, he had no right to demand or sue for its recovery until the term of bailment had expired, although Pritchett had, during the term, exchanged it for the mare. This argument is clearly unsound. If the exchange was made during the term of the bailment, without plaintiff's consent, this amounted to a conversion of the mule, and authorized the plaintiff forthwith to terminate the bailment, and to sue for the recovery of the mule.—*Story on Bailments*, §§ 396 and 413; *Greenl. on Ev.* § 642; *Nelson v. Bondurant*,

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26 Ala. 341. Evidently to meet this argument, the third charge was asked by the defendant, and it is free from error.

Affirmed.

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Indictment against Immigrant, for Leaving Service without Paying Expenses Advanced.

1. *Appeal by State.*—Under the statute giving the State a right of appeal in a criminal case, when the statute under which the indictment was found is held to be unconstitutional (Sess. Acts 1880–81, p. 65), the record must affirmatively show that the constitutionality of the statute was assailed by demurrer, and that the court held it to be unconstitutional; and when the record does not affirmatively show this, the appeal will be dismissed.

APPEAL from the Circuit Court of Escambia.

The record does not show the name of the presiding judge.

The indictment in this case was found at the March term of said court, 1881, and charged that the defendant, Joseph Bauerman, “an immigrant, and a citizen of North Carolina, who had contracted with William M. Carney, in said State of North Carolina, to serve him as a laborer, for twelve months, in the State of Alabama, at and for a compensation of twenty-five dollars per month, and having obtained from said Carney his passage-money to this State, and other advances, to the aggregate amount of nineteen dollars, did abandon or leave the service of said Carney, eleven months before the expiration of his term of service, without re-paying all of said passage-money and other advances; against the peace,” &c. The defendant demurred to the indictment, assigning the following grounds of demurrer: “1st, that said indictment does not allege that the contract of service between defendant and the alleged employer is in writing, and recorded in the probate office of the county of employer’s residence; 2d, that said indictment does not charge defendant with the violation of any law in this State; 3d, that said indictment does not show that defendant was an emigrant, with whom a contract had been made in a foreign country, or that it was within two years after the arrival of such *emigrant* in this country.” The judgment on the demurrer is in these words: “Comes the State, by its solicitor, and also the defendant in his own proper person, and by counsel; and the defendant demurs to the indictment; which demurrer, upon

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consideration by the court, is sustained; to which ruling the State, by its solicitor, excepts; and the said indictment is quashed and annulled."

H. C. TOMPKINS, Attorney-General, for the State.

J. M. WHITEHEAD, *contra*.

SOMERVILLE, J.—The present appeal is taken by the State, from the judgment of the Circuit Court, sustaining a demurrer to an indictment in a criminal case.

Such an appeal is authorized, in certain cases, under a late statute, entitled "An act to secure the right of appeal to the State in criminal cases, when the act of the General Assembly, under which the indictment is found, is held to be unconstitutional;" which was approved December 8th, 1880.—Acts 1880-81, p. 65. This act provides, that "the constitutionality of a statute, under which an indictment is found, can only be raised by demurrer to the indictment or complaint," and that, when the act is held to be unconstitutional, "the solicitor may take an appeal on behalf of the State, to the Supreme Court."

The conditions, upon which this right is secured to the State, it will thus be seen, are two: *first*, the act must have been pronounced by the lower court to be *unconstitutional*; *second*, this decision must have been made by the court on *demurrer*, interposed by the defendant. An exception being thus incorporated by this statute into the general rule, which denies to the State the right of appeal in criminal cases, we are of opinion that the record should affirmatively show that the constitutionality of the act assailed was one of the questions specifically presented by the demurrer. The clear legislative intent is, that the lower court shall not consider or decide the question of the constitutionality of any statute, unless it is presented by demurrer with reasonable certainty, alleging, in substance, that the statute is violative of a certain article and section of the constitution, or, at least, in what particular respect it is violative of the fundamental law. If the judgment-entry shows, however, that the specific ground of the court's decision was the unconstitutionality of the act under which the indictment was found, and any ground of demurrer assigned is broad enough to embrace the question, although ambiguous, we need not say that the State would, in such cases, be debarred of the right of appeal intended to be secured by the act under consideration. But it is needless to say that such a case can not properly arise, so long as a proper regard is had for the rules of pleading in *nisi-prius* courts.

The record fails to show a case within the statute, it no

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where appearing that the act, under which the indictment was found, was declared to be unconstitutional by the Circuit Court, or that it was assailed by demurrer on this specific ground. The appeal is, for this reason, dismissed.

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Application by Administrator for Order to sell Lands for Payment of Debts.

1. *Plea of statute of limitations of three years.*—A plea of the statute of limitations of three years must aver that the demand sued on is an open account, and the omission of this averment makes the plea demurrable; but this rule of pleading is not applicable to a proceeding in the Probate Court, where an administrator files a petition asking an order to sell lands for the payment of debts, and the defense is set up that the debts asserted against the estate are barred by the statute of limitations.

2. *Petition to sell lands for payment of debts; pleadings and defenses.* In a proceeding before the Probate Court for an order to sell lands for the payment of debts, the technical rules of pleading can not be strictly applied. It is not necessary that the petition should particularly describe the debts, to the payment of which the lands are sought to be subjected; the answer of the heir or devisee, denying the existence of the asserted debts, may be in terms equally general; and on the issue thus formed, the burden of proof being on the administrator, if the debts proved are open to any legal defense, which could be available against an action by the creditor, that defense is equally available to the heir or devisee.

3. *Open account.*—A demand arising out of contract, the terms of which have not been agreed on between the parties, whether it consists of one item or more, is an open account, within the bar of the statute of limitations of three years; so, also, is a demand for personal or professional services rendered, the value of which can only be recovered on a *quantum meruit*; but a claim for money paid on request, under circumstances from which the law implies a promise to repay, is not an open account.

4. *Same; professional services of physician.*—A demand for professional services as a physician, rendered to the intestate in his life-time, is an open account, when the value of the services was not agreed on between the parties; and the frequent expressions and declarations of the intestate, showing an anxiety that the claim should be paid, but not admitting an indebtedness in any particular sum, can not change the character of the demand.

5. *Same; burial expenses.*—Burial expenses of the decedent, which necessarily devolve on his friends and relations before the grant of administration, are regarded as money paid on the request of the personal representative, and the law implies a promise on his part to repay it; and a claim for such expenses, so paid, is not an open account.

6. *Parties to proceeding; appointment of administrator ad litem.*—On an application by an administrator for an order to sell lands for the payment of debts, which is contested by the heirs or devisees, the administrator is their adversary, whether he is personally a creditor or not; and

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there can be no necessity for the appointment of a special administrator *ad litem* (Code, § 2625).

APPEAL from the Probate Court of Dallas.

Tried before the Hon. P. G. WOOD.

In the matter of the petition of Anna M. Gayle, as the administratrix of the estate of Lou Reese Gayle, deceased, for an order to sell lands for the payment of debts. The petition was filed on the 18th August, 1881, and alleged, "that said decedent died intestate; that the personal property of the estate is insufficient to pay the debts thereof; that the lands of said estate, which it is desirable to sell for the payment of the debts thereof, are an undivided one-fifth interest in the lands of the estate of Mrs. Mary L. Gayle, deceased, who was the mother of said L. R. Gayle," and particularly described the lands. The decedent died, intestate (so far as the record shows), on the 30th June, 1875, being unmarried, and under the age of twenty-one years; and her surviving brothers and sisters were her heirs at law, and the distributees of her estate. Mrs. Rebecca D. Johnston, the wife of Wm. S. Johnston, one of the sisters, died a short time before the petition was filed; and her surviving husband, William S. Johnston, and the guardian *ad litem* of her infant children, who was also appointed administrator *ad litem* of her estate, appeared and contested the petition. The contestants filed a demurrer to the petition, which was overruled by the court; and they then filed an answer, denying all the allegations of the petition, alleging that "all the debts against said estate are barred by the statute of limitations of three years," and by the statute of limitations of six years, and setting up other defenses. The court sustained a demurrer to the answer, as to these other defenses, which require no notice; but, on the evidence adduced, held that all the debts asserted against the estate were open accounts, and were barred by the statute of limitations of three years, and therefore dismissed the petition, at the costs of the petitioner. The principal debts claimed against the estate were—1st, a demand in favor of the administratrix personally, for \$960, on account of personal services rendered for the intestate, in nursing and taking care of her, during the twelve months preceding her death; 2d, a demand in favor of said administratrix personally, for \$80, the price paid for a burial casket; 3d, a demand in favor of Dr. B. H. Riggs, for \$256, for professional services rendered to the intestate during the last twelve months of her life. Evidence was introduced by the administratrix showing the value of these services, and the repeated declarations by the intestate of her desire that these claims should be paid; and several exceptions were reserved to the rulings of the court in connection with

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this evidence. The order appointing an administrator *ad litem* for the estate of Mrs. Rebecca D. Johnston, the decree dismissing the petition, and holding that the debts proved against the estate were open accounts, and the several rulings on evidence to which exceptions were reserved, are now assigned as error.

W. R. NELSON, for appellant.

SATTERFIELD & YOUNG, *contra*.

BRICKELL, C. J.—It may be conceded to the appellant, that a plea of the statute of limitations of three years should aver the cause of action is an open account, and, if the averment is omitted, the plea is demurrable. But, in a proceeding of this character, in the Court of Probate, to subject lands devised or descended to the payment of debts, the formal pleadings pertaining to courts of law or equity are not contemplated, nor are they usual or practical. The application of the personal representative is sufficient, if in general terms it avers the existence of debts against the ancestor; no description of the debts, no averment of the persons to whom they are due, or of the time of their creation, or when payable, is necessary. Any such averment would render the application unnecessarily prolix, and would be inconsistent with the simplicity of the proceedings prescribed by the statute. The answer of the heir or devisee is sufficient, if in terms as general it denies the existence of debts, to the payment of which the lands are subject. An issue is thus formed, and the burden of proof is devolved upon the personal representative, the actor in the proceeding, who has knowledge of the debts for the payment of which he seeks a sale of the lands. If the debts proved are open to any legal defense—to any defense which the ancestor could make if living, or which the personal representative could make if the creditors were suing him,—the heir or devisee has the unqualified right to interpose and rely upon it.—*Bond v. Smith*, 2 Ala. 660; *Harwood v. Harper*, 54 Ala. 659; *Teague v. Corbitt*, 57 Ala. 529; *Garrett v. Brewer*, 59 Ala. 513; *Scott v. Ware*, 64 Ala. 174.

The material point of controversy between the parties is, whether the claims proved to exist against the intestate are open accounts within the bar of the statute of limitations of three years. The character or description of account which comes within the meaning of the term *open account*, employed in the statute, has been frequently determined. Whether the account consists of a single or of many items, if the terms of the contract have not been adjusted by the agreement of the parties,

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the demand is an open account.—*Maurry v. Mason*, 8 Port. 211; *Sheppard v. Wilkins*, 18 Ala. 359. The claim of the appellant, for the services rendered to the intestate, falls precisely within the character and description of claims there defined as an open account. The sum to be paid her was not settled between herself and the intestate, and the extent of her right of recovery is the reasonable value of her services, to be ascertained by evidence. The accounts of the physicians stand upon the same footing. There was no stipulation with the intestate as to the sum to be paid them, for the services they rendered. The right of recovery is upon a *quantum meruit*—such compensation as it is shown by evidence the parties rendering the services ought in equity and good conscience to receive. There is no special contract upon which a recovery can be had. It is against claims not resting in special contract, dependent wholly upon the implication of law from facts proved, the statute is directed. The parties are forewarned, a reasonable time is given for the reduction of the claim to a stated account, or in some other form to a special agreement, withdrawing it from the operation of the statute. The frequent expression by the intestate of her anxiety that these claims should be paid, is insufficient to change their character. There was no recognition or admission of any particular sum as due or owing, and they are in themselves too general and uncertain to be construed into evidence of an account stated, or of the correctness of the claims as now presented.—*Watson v. Byers*, 6 Ala. 393; *Boxley v. Gayle*, 19 Ala. 151. The willingness of any one or more of the heirs that these claims should be paid, is not a fact of importance in this proceeding, directed to a sale of the lands of the intestate, and in which it must be shown there are valid and subsisting debts of her creation, to the payment of which the law subjects them.

The remaining claim is for money paid by the appellant for a burial casket for the intestate. Funeral expenses, says Lord Coke, according to the degree and quality of the deceased, at common law were allowed of the goods of the deceased, before any debt or duty whatever, and his burial was the first duty of an executor. If there was no executor, or if he was unknown, or not at hand, a friend or a stranger may attend to the duty, and bury the deceased in a manner suitable to the estate he leaves behind him; and the necessary expenses must be repaid him by the personal representative, having assets, though he neither ordered, nor had knowledge of the expenditure.—2 Williams Ex'rs, 871. The burial, of necessity, here devolves as a duty upon friends or relatives; for, until fifteen days after death, there can be no administration, or grant of letters testamentary.

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Priority of payment of funeral expenses, as at common law, the statute secures.—Code of 1876, § 2430. The amount of such expenses, when paid by a friend or relative, is regarded as money paid on request of the personal representative; and the law raises a promise to repay it, so far as he has assets.—*Hagood v. Houghton*, 10 Pick. 154. Money paid on request is not an open account—the amount which is to be repaid is not dependent on any future liquidation or settlement between the parties, and the claim for it is not within the bar of the statute of limitations of three years.—*Caruthers v. Mardis*, 3 Ala. 599. Six years had not elapsed from the death of the intestate, when this expense was incurred, until the grant of administration to the appellant; and after the grant there was no room for the running of the statute of limitations. The evidence shows satisfactorily a want of personal assets for the payment of debts, and the existence of this debt created the necessity for the sale of the lands, which is contemplated by the statute. We deem it proper to say, in this connection, that there is no evidence in the record tending to show the expenditure was extravagant or unreasonable. The amount of such expenditures should be graduated to the degree and condition in life of the deceased, the value of the estate he may leave, and, when the rights of creditors are involved, the probability of the solvency of the estate ought to be regarded by those who may make them.

The appointment of an administrator *ad litem* for the representation of the estate in this proceeding was unnecessary and unauthorized. Such an appointment is necessary or proper—is contemplated by the statute—only when there is not a legal representative of the estate, or the legal representative has an adverse interest. In cases where there is a full representation of all the rights and interests involved in the estate, by the presence of the parties in whom these reside, there can be neither necessity nor propriety in the intrusion of an administrator *ad litem*.—Code of 1876, § 2625. The personal representative, in a proceeding of this character, whether he be a creditor or not, stands in an adversary relation to the heirs or devisees. The interests in the estate he represents, are the interests of creditors. The heirs or devisees must be before the court in the attitude of defendants, having full opportunity to protect their rights. It is difficult to perceive who an administrator *ad litem* could represent, or what function or duty he could have to perform.

There are other questions presented by the assignment of errors, not of any practical importance, and we do not deem it necessary to consider them.

The decree of the Court of Probate must be reversed, and
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the cause remanded, for further proceedings in accordance with this opinion.

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Bill in Equity by Creditor, to set aside Fraudulent Conveyance.

1. *Receiver; when appointed before answer.*—By the modern English practice, and by the practice in this country, a receiver may be appointed before answer filed, when a pressing necessity is shown, since delay might defeat the object sought by the application.

2. *Same; at whose instance appointed.*—As a general rule, a receiver will not be appointed at the instance of a party who does not show some title, claim, lien or interest, in, to, or upon the property, or specific thing in litigation; but a creditor by simple contract only, being now authorized by statute to file a bill to reach and subject property fraudulently conveyed by his debtor (Code, § 3886), acquires by his bill, and the service of process under it, such an interest and lien in and upon the property as entitles him to ask the appointment of a receiver for its custody and preservation.

APPEAL from the Chancery Court of Conecuh.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 22d November, 1882, by Goetter, Weil & Co., a mercantile partnership doing business in the city of Montgomery, as a creditor at large of M. H. Jacoby, against said Jacoby and Mark Weis; and sought to set aside, on the ground of fraud, a sale and transfer of his entire stock of goods by said Jacoby to said Weis; and also an injunction to prevent the defendants from removing or disposing of the goods, and the appointment of a receiver to take charge and custody of the property; on the ground that the defendants were insolvent, and were fraudulently selling the goods for cash. The decree is sued out from a decretal order appointing a receiver, and that order is assigned as error.

STALLWORTH & BURNETT, and D. P. BOWLES, for the appellants, cited High on Receivers, §§ 406, 103-4; *McLean v. Presley*, 56 Ala. 212; *Hughes v. Hatchett & Trimble*, 55 Ala. 631; *Brierfield Iron Works v. Foster*, 54 Ala. 622; Story's Eq. Pl. § 309; 1 Dan. Ch. Pr. § 395.

FARNHAM & RABB, *contra*, cited 2 Story's Equity, § 831; *Ex parte Walker*, 25 Ala. 81; *Bard v. Bingham*, 54 Ala. 466; 2 Dan. Ch. Pr. 1406, 1426; *Evans v. Welch*, 63 Ala. 250.

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STONE, J.—This is an appeal from an order appointing a receiver, and the record presents no other question. The bill was filed November 22d, 1882, and on the same day summons was issued and served on each of the defendants. On the same day, November 22d, a petition was filed, praying the appointment of a receiver, and setting November 28th for its hearing in vacation. Notice of this motion was also issued and served on the same day, November 22d. The bill was by a creditor at large, and was filed under section 3886 of the Code, which enacts that, “a creditor without a lien may file a bill in chancery, to subject to the payment of his debt any property which has been fraudulently transferred, or attempted to be fraudulently conveyed by his debtor.” The chancellor first made an order for an injunction, prescribing the bond to be given by complainants before its issue, and then appointed a receiver, the appointment to take effect after the injunction bond should be approved, and requiring the receiver to give bond before entering upon the trust. The bonds were given, and an order was issued, placing the receiver in possession, and prescribing his duties. The property sought to be condemned is a stock of merchandise, alleged to have belonged to Jacoby, the debtor, and charged to have been fraudulently conveyed to Weis.

It is urged for appellant, that the application for a receiver was premature, and should not have been entertained until after answer filed. Such is said to have been the rule in the earlier English practice. But the rule there was relaxed many years ago. In a note to *Huguenin v. Basily*, 13 Vesey, 105–7, it is said, “that, in modern practice, an order for a receiver may be obtained on motion, grounded on affidavit, before answer, whenever justice appears to require it.” In *High on Receivers*, § 103, the author says: “It may be regarded as the settled English practice, to grant receivers before answer, in cases of emergency calling for immediate interference of the court to protect the equities of plaintiffs, and where the merits of the cause are sufficiently disclosed by affidavits; and if defendant has put in an affidavit, in opposition to plaintiff’s affidavit upon the motion, the affidavit will be regarded as a sufficient appearance for the purpose of entertaining the motion.” This is the principle declared in *Vann v. Barnett*, 2 Bro. C. C. 158. In section 105, Mr. High, speaking of cases of fraud and imminent danger, says: “Where the emergency shown is such as to render it essential to justice that a receiver should be immediately appointed, it may be done before answer, since to delay the relief might entirely defeat the object sought by the application.” There is nothing in this objection.

It is objected, in the next place, that the complainants are only creditors at large, without a judgment, and that therefore

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they are not entitled to have a receiver appointed at this stage of the proceedings. The general rule is, that to entitle a complainant to a receiver, he must show some title or claim, lien upon, or interest in the specific thing, the subject of the litigation. A mere creditor at large, seeking in the ordinary way to collect his money, has no right to this extraordinary remedy. It is nevertheless remedial, very beneficial in its operation when rightly invoked, and should not be withheld from cases falling within its principles.—High on Rec. § 406. "In cases where an estate is held by a party, under a title obtained by fraud, actual or constructive, a receiver will be appointed."—Story's Eq. Jur. § 834. "The practice is especially salutary in cases of creditors' bills in aid of the enforcement of judgments; and in this class of cases receivers are almost uniformly granted before answer."—High on Receivers, § 105. "Creditors, even before judgment, may have such a special or equitable lien upon the debtor's property as to entitle them to the aid of equity, and to the protection of a receiver."—*Ib.* § 408. "Fraudulent assignments of his property by a judgment debtor, for the purpose of hindering and defeating his creditors, are frequently made the foundation for proceedings in equity for the appointment of a receiver in behalf of judgment creditors."—*Ib.* § 411. Such proceedings fasten a lien upon the property, which will override all other subsequently accruing liens and purchases. *Dargan v. Waring*, 11 Ala. 988. "If the creditor has a lien or charge upon the property of the debtor, even though his demand may not be reduced to judgment, he occupies a different relation from that of a mere contract creditor, and may properly invoke the preventive powers of the court for his protection."—2 High on Injunctions, § 1404. In *Brierfield Iron-Works v. Foster*, 54 Ala. 622, we said: "A receiver ought to be appointed only to prevent fraud, save the subject of litigation from material injury, or rescue it from threatened destruction. Nor should it be done then, until answer to a bill praying it has been made by defendant, unless the necessity be of a most stringent character."

What we have above quoted, from books of the highest authority, proves two propositions: First, that in cases of pressing emergency, the Chancery Court may appoint a receiver before answer filed; and, second, a receiver may be appointed, whenever the complainant has a lien, or a special right to have the property or funds in controversy applied to the payment of his claim. Of course, this must be taken with the qualification, that there must be shown a sufficient necessity for taking the property into the court's custody.

The statute which now forms section 3886 of the Code of 1876 was enacted February 24, 1860.—Pamph. Acts, 35. Be-

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fore that time, a bill would not lie in such a case as this. It did lie, to enforce a judgment, by removing fraudulent obstructions, in such a case as that shown in *Dargan v. Waring, supra*; and when filed and served, it fastened a lien on the property sought to be subjected. The lien was not the result of the judgment, for the judgment in that case was not a lien. It resulted from the bill, filed as a means of enforcing the judgment. There can be no question that if, in that suit, it had been shown that a necessity existed for preserving the fund, or its income, for the payment of the judgment, a receiver should have been appointed. Insolvency of the defendant, and threatened waste, or inadequacy of the *corpus* of the property to satisfy the demand, are among the grounds which would have authorized this extraordinary remedy. The act of 1860 (Code, § 3886) gives to a creditor without a lien the same right to pursue property fraudulently transferred, or attempted to be fraudulently conveyed, as a creditor with a judgment had previously had; and when a bill is filed under that statute, and process of summons is served on the defendant, "a lien is acquired on the property conveyed, which will prevail over any subsequent alienation by the debtor or his grantee, and over the claims of subsequent judgment creditors, or of an assignee in bankruptcy." *Evans v. Welch*, 63 Ala. 250. Nothing in this objection.

The sworn statements found in this record make a very strong *prima facie* case of pressing emergency, and the rebutting affidavits are wholly insufficient to overturn it.

Affirmed.

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Action on Promissory Note, by Indorsee against Maker.

1. *Construction of writings; questions for court and jury.*—It is the province of the court to construe written instruments, and to declare their legal effect; although, when the legal operation and effect of the instrument depends, not only on the meaning and construction of the words used, but also upon collateral facts and extrinsic evidence, the inference of fact to be drawn from the evidence should be submitted to the jury: yet, if the evidence is addressed to the court, without objection, and passed on, the court may draw all such inferences as the jury could properly have drawn.

2. *Ambiguity in contracts; rules of construction.*—The law leans against the destruction of contracts on the ground of uncertainty, and a contract will not be declared void on that ground, unless, after reading and interpreting it in the light of the circumstances under which it was made,

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and supplying or rejecting words necessary to carry into effect the reasonable intention of the parties, their intention can not be fairly collected and effectuated.

3. *Promissory note; time of payment omitted or uncertain; parol evidence in aid of.*—A promissory note ought, regularly, to express on its face the time at which it is payable; and if no time is expressed, or plainly manifested, and a blank is not left for the insertion of a day of payment at the option of the payee, resort may be had to extrinsic evidence, showing the circumstances under which the note was executed, and the design of the parties in executing it, in order to explain an evident omission, and to fix the time at which it was intended to make the note payable.

4. *Same.*—A promissory note payable “*seventy-five after date*,” negotiable and payable in bank, and proved to have been made for the accommodation of the payees, who were commission-merchants in Mobile, to aid them in their business, and delivered to them by the maker, construed to be payable *seventy-five days* after date; and parol evidence was held admissible, in aid of the evident omission, showing the character of negotiable paper, as to length of time of maturity, which the banks in the city would accept.

5. *Transfer of negotiable note as collateral security; rights of holder, and defenses by maker.*—A creditor, receiving negotiable paper as collateral security for the payment of a pre-existing debt, is not regarded as having acquired it for valuable consideration in the usual course of trade, and is not entitled to protection against equities and defenses on the part of the maker of which he had no notice; and under the decisions of this court, contrary to the weight of authority, accommodation paper is not an exception to this rule.

6. *Same.*—To constitute a purchaser for value, of notes or paper agreed to be transferred as collateral security for a debt contemporaneously contracted, it is not necessary that the notes or paper should be particularly described at the time: when the securities are subsequently transferred, in execution of the agreement, it is rendered specific and certain, and the creditor becomes a holder for value.

7. *Relevancy of evidence as to terms of agreement for transfer of note as collateral security.*—In an action against the maker of a negotiable promissory note, proved to have been given for the accommodation of the payees, and by them transferred to the plaintiff bank as collateral security for a loan; the defense being want of consideration, and the terms of the agreement for the transfer being controverted—whether it was subsequent to the loan, or was made under an agreement contemporaneous with the loan; the fact that no portion of the money loaned was drawn out of the bank until after the transfer of the note, is relevant and competent evidence for the plaintiff.

APPEAL from the City Court of Selma.

Tried before the Hon. JONA. HARALSON.

This action was brought by the Bank of Mobile, a domestic corporation, against Starke H. Boykin; and was founded on a promissory note signed by said Boykin as maker, and in these words:

“MOBILE, ALA., January 27th, 1880.

“*Twenty-five after date*, I promise to pay to the order of B. O. James & Co. twenty-five hundred dollars, value received, negotiable and payable at the Southern Bank of Alabama.”

This instrument was indorsed in blank by the payees, and the plaintiff sued as their indorsee; the complaint describing

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the instrument as a promissory note payable seventy-five *days* after date, and alleging that it was transferred to plaintiff, for value, before maturity, and was still due and unpaid. The defendant pleaded the general issue, and several special pleas, which alleged, in substance, that he signed the note for the accommodation of the payees, and that it was transferred and delivered by them to the plaintiff, as collateral security for a pre-existing debt, and without any other consideration. Issue was joined on these pleas, and a trial by jury was had on the demand of the defendant. A bill of exceptions was reserved by the defendant, to the rulings of the court on the trial, in which the facts are thus stated:

"R. F. Manly, a witness for plaintiff, testified as follows: 'I was cashier of the Bank of Mobile in March, 1880, and am now, and have been since January, 1875. I know B. O. James & Co., who did business in Mobile, in March, 1880, as cotton-factors and commission-merchants. They opened an account with the Bank of Mobile, on March 15th, 1880, when Mr. James came into the bank, and stated that he would like to do business with us, as the bank with which he had been doing business was going out of business, and that he would like to make a temporary loan, and would give his due-bill and security. I was also acting that day as teller. He then gave me a demand note, promising to pay \$5,000, with interest, on demand, and two notes,—the one now sued on and another. He gave me, also, at the time, a slip containing names as references as to the solvency of the makers of the said notes. I took the note of said B. O. James & Co., and entered the \$5,000 to their credit on their bank-book. Later during the day, I made inquiries regarding the solvency of the parties, and was advised that they were good for the notes they had signed. He gave me, with said demand note, two pieces of paper—first, a note signed by S. H. Boykin, dated January 27th, 1880 (the note sued on), and another note. I am not certain whether I gave him the bank-book instantly, or after I made the inquiries. The bank took Boykin's said note, and another, for \$2,500 each. I placed the \$5,000 to the credit of said B. O. James & Co., and they checked it out a few days afterwards. The Boykin note was given at the time said James proposed to borrow the \$5,000, or a few minutes afterwards. I did not notice the precise reading of the note. We were not at that time taking paper payable in the fall. The Southern Bank of Alabama is in Mobile. I had been doing a banking business, in its various phases, for many years.' Plaintiff's counsel then asked said witness to answer this question, which was for the court: 'Are you acquainted with the usual course of trade in reference to time paper, and the length of time usually given

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on notes taken for the loan of money by the banks of Mobile, in March, 1880'? The witness answered: 'I am acquainted with the usual time for which paper was given, for security for loans, at that time.' To this question and answer, each, the defendant objected; and he excepted to the overruling of his objections. The witness further answered: 'Just at that time, the banks were not commonly taking fall paper, but were usually taking paper which fell due in two or three months. No paper was taken for seventy-five weeks, months, or years.' The defendant moved to exclude this answer, on the ground that it was irrelevant; and he excepted to the overruling of his objection. The court received the foregoing answers to said question, as tending to show the situation of the parties, and the circumstances surrounding them at the time."

The plaintiff then offered in evidence the note on which the action was founded, above copied; and the defendant objected to its admission, on these grounds: "1st, because said instrument is not the note described in the complaint; 2d, because there is a variance between said instrument and the note described in the complaint; 3d, because said instrument is irrelevant." The court overruled these objections, and allowed the instrument to be read in evidence to the jury; and the defendant excepted. The witness Manly, further testifying, stated: "The Boykin note, here sued on, was taken, and pinned to the demand note of B. O. James & Co. On the 29th March, 1880, I made demand in writing of B. O. James & Co., for the payment of the loan; but it was not paid, and has not since been paid. When said Boykin note was offered, I had no notice that it was accommodation paper. Mr. James stated, that the paper was good—that the maker was a party he knew to be good; and he gave me references to others, to confirm his statement. It was on the faith of this and the other note that we placed the \$5,000 to the credit of B. O. James & Co. They checked it out in a few days. I paid the checks." Said witness testified also, on cross-examination: "The usual custom of farmers', or country merchants' paper, was of two kinds: one was paper expected to be paid out of the present crop, and the other out of the next crop; one was long, and the other was short paper. I have seen a good deal of it fall due in April. That would be payable out of the crop of the preceding year. A great majority of such paper does not mature at that time. There is a great deal of such paper maturing in October, November, and December, but a respectable amount in March, April, and May." Said witness, on re-examination by plaintiff, further said: "The usual period of paper by country merchants or farmers, making paper in January, does not run into the next season. The majority of it, that I have seen, matures before the summer months."

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B. O. James, a witness for defendant, thus testified: "I did not give the defendant any consideration for the note read in evidence in this case. It was given for the accommodation of B. O. James & Co., of which firm I was then a member, and was the business man of the firm. Defendant did not owe B. O. James & Co. anything. A short time before our failure, I commenced doing business with the Bank of Mobile, the Southern Bank of Alabama (with which I had done business) having retired. I went to see Mr. Manly, and told him I would like to open business with him. I opened an account with the Bank of Mobile for \$5,000, by borrowing that sum from the bank. I gave my due-bill, or demand note, for the sum borrowed, and went out with the bank-book and a bundle of checks. During the day I handed Mr. Manly collaterals to secure the amount of the due-bill previously passed to my credit, and gave him references as to the standing of the parties. One of the notes he accepted was this of Boykin's. I handed him other notes, and he selected two, one being the note read in evidence. It was about eleven o'clock when I got the bank-book and checks, and I gave him the notes before the close of banking hours—before two o'clock P. M. Mr. Manly said, at the time, that it was the custom, or regulation, to have collaterals. I told him I would give some that I thought would be satisfactory. No particular collaterals were mentioned." [On cross-examination:] "I proposed, at the time of the loan, that I would give collaterals. I gave none to Mr. Manly at that time, but told him I would give him collaterals which I regarded as good. I don't know what collaterals I had with me at the time. I brought in the collaterals before the close of banking hours. The defendant was doing business with B. O. James & Co., so far as cotton was concerned. I wanted his accommodation paper to borrow money on. I wanted it to have it convenient for use if I was crowded. He was a farmer and a country merchant. He gave drafts on me to pay parties he owed in Mobile. I wrote the paper sued on. I asked him for the paper. I don't remember what was said as to the time I wanted the paper to run. I don't remember what occurred, except from the face of the paper. I don't remember anything, except that the paper exists. I gave Manly references at the time I gave him the notes. I don't remember to whom I referred him for Boykin's note. I don't remember whether I read the note of Mr. Boykin. He owed me nothing at the time the note was executed." The witness Manly, then being recalled by plaintiff, said: "The paper was in the possession of the bank before any money was paid out." The defendant moved to exclude this statement from the jury, "on the ground that it was irrelevant," and excepted to the overruling of his

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- objection. "The court instructed the jury, that this evidence was admitted as tending to show the contract between plaintiff and said James & Co.—whether they could draw or not before the collateral was taken."

"This was all the evidence in the case. Then the defendant, in connection with the testimony of James that Boykin was a farmer and a country merchant, and in connection with the testimony of Manly on cross-examination, moved the court to exclude what Manly said about the custom of banks in Mobile, 1st, because said testimony was irrelevant; 2d, because the custom was not brought home to the defendant; 3d, because no custom was established by the testimony; and, 4th, because the custom sought to be proved could not vary the terms of the written instrument. The court overruled the motion, and the defendant excepted.

"The court instructed the jury, in its general charge, as follows: 'If the jury believe, from the evidence, that on the day of the loan, and at the time the bank entered the credit on the pass-book of B. O. James & Co., there was an understanding between the bank (Mr. Manly) and Mr. James, that James was to give satisfactory collateral for the loan, and that the loan was to be conditional upon such collateral, and the bank made it with that understanding; then, if said James brought in this note on the same day, and this was in pursuance of his said promise to give collateral, and of that understanding in reference to the security upon which it was to be made (if the jury believe, from the evidence, that such an understanding was had),—then the lodgment of the note later in the day would, in the eye of the law, be the same as if it had been lodged at the moment when the credit was entered on the pass-book.'

To this part of the general charge the defendant excepted, and requested the following charges, in writing: 1. "If the jury believe, from the evidence, that the note sued on was accommodation paper, then, before they can find for the plaintiff, they must believe, from the evidence, that the money was loaned by the plaintiff on the faith and security of this identical note: that if the plaintiff loaned the money to B. O. James & Co. on their due-bill, and Mr. James promised to furnish collaterals, but did not promise to furnish the note sued on in this case, then they must find for the defendant." 2. "If the jury believe, from the evidence, that the plaintiff loaned money to B. O. James & Co. on their due-bill, or demand note, and on the promise of said James to furnish good collateral security for said loan; and nothing was said about the note sued on, and there was no agreement to furnish said note as collateral security, but said James & Co. afterwards furnished said note as collateral security to said loan; then they must

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find for the defendant." The court refused each of these charges as asked, and the defendant excepted to their refusal.

The rulings of the court on the evidence to which exceptions were reserved, as above stated, the charge given, and the refusal of the charges asked, are now assigned as error.

SATTERFIELD & YOUNG, for appellant.—(1.) The instrument sued on was not a promissory note, as no time of payment was specified, and was not governed by the commercial law.—Code, § 2094; Story on Prom. Notes, § 27; Story on Bills, § 50; *Moffatt v. Edwards*, 1 Car. & Marsh. 16. (2.) This was a patent ambiguity, which could not be aided or explained by parol evidence; and there was a fatal variance between the instrument described in the complaint and that offered in evidence.—*Copeland & Brantley v. Cunningham*, 63 Ala. 394; *Sanford v. Howard*, 29 Ala. 684; *Hamner v. Cobb*, 2 Stew. & P. 383; *May & Bell v. Miller & Co.*, 27 Ala. 515; *Reed v. Scott*, 30 Ala. 640; *Foster v. Ross*, Minor, 421; *McLendon v. Godfrey*, 3 Ala. 181. (3.) The evidence as to a custom, or usage, among the banks in Mobile, ought not to have been received. "It does not follow, because a usage exists as to the object of a contract, that the contract is meant by the parties to incorporate the usage."—Whart. Ev. § 958. Before a party can be affected by a custom or usage, it must be brought home to him. *Ib.* § 962. If the defendant had lived in Mobile, and it was shown that he had bought goods of James & Co. on a credit of seventy-five days, and had given this note for the payment of the debt, the inference might be drawn, that the note was intended to be made payable seventy-five days after date; but, it being shown that he was a farmer and country merchant, and was not indebted to the payees, but executed the note for their accommodation only, there can be no legitimate inference as to the time of payment intended. In the case of negotiable paper, the rule which excludes parol evidence to vary the terms of a writing, when sued on contractually, is enforced with distinctive stringency.—Whart. Ev. § 1058. (4.) The evidence of Manly, as to the note being in the possession of the bank before any money was drawn out, ought not to have been received. As to the terms of the contract of loan—whether or not it was complete before the collateral was taken—the evidence was conflicting; but this testimony was not relevant to that issue, since the loan might well have been complete although the money had not been drawn out; and yet, the fact not being disputed that the money was not drawn out, the jury might infer that there was a stipulation or agreement that it should not be drawn out until the collateral was given. (5.) With due deference to the opinion delivered in the case of *Miller & Co.*

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v. Boykin, at the last term, the appellant insists on the correctness of the principle asserted in the charges requested and refused, and asks a re-examination of the authorities.

W. C. WARD, *contra*, cited *Evans v. Steele*, 2 Ala. 114; *White v. Word*, 22 Ala. 442; *Conner v. Routh*, 7 How. Miss. 176; *Nichols v. Frothingham*, 45 Maine, 220; *Pearson v. Stoddard*, 9 Gray, 199; Byles on Bills, mar. '76, note 2; Daniel on Neg. Instruments, §§ 76, 1404; *Miller & Co. v. Boykin*, 70 Ala. 469; *Connerly v. P. & M. Insurance Co.*, 66 Ala. 432.

BRICKELL, C. J.—It is the province of the court to construe written instruments, and declare their legal effect. But, when the legal operation and effect of an instrument depends, not only on the meaning and construction of its words, but upon collateral facts *in pais*, and extrinsic evidence, the inference of fact to be drawn from the evidence should be submitted to the jury.—1 Brick. Dig. 428, § 2. Whether, in the present case, it should have been submitted to the jury to determine from the evidence when it was intended the note should be due and payable, it is not important to consider. The evidence was addressed to the court only, without objection, and was passed upon; and the court could, therefore, draw all such inferences as the jury could have drawn properly.

A promissory note ought, regularly, to express upon its face the time at which it is payable; but, if no time is expressed, and there is not a plain manifestation of an intention to express a day of payment, the law intervenes, and implies that it is payable on demand.—Story on Prom. Notes, § 29. Or, if a blank is left on the face of the note, for the insertion of a day of payment, and in this imperfect condition it is delivered by the maker to the payee, the latter is clothed with a discretionary authority to insert such day of payment as he may choose. *Mitchell v. Culver*, 7 Cowen, 336. Or, if a certain day of payment is intended, and by mistake or inadvertence omitted, the holder may insert it, and the insertion is not an unauthorized, material alteration, which will vitiate the note.—*Boyd v. Brotherson*, 10 Wend. 93.

This note can not, without violence to the intention of the maker, as shown upon its face, be regarded as payable on demand; nor does there seem to have been a blank left for the insertion of a day of payment; nor is there direct evidence of an intention or agreement to make it payable at a particular time. The proposition pressed by appellant is, that the note is consequently void for uncertainty. The law leans against the destruction of contracts because of uncertainty, and they are not suffered to perish, unless, after reading and interpreting

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them in the light of the circumstances under which they were made, the intention of the parties can not be fairly and reasonably collected and effectuated.—*Robinson v. Bullock*, 58 Ala. 618. Words may be supplied, or may be rejected, when necessary to carry into effect the reasonable intention of the parties. In *Chitty on Bills*, 151, it is said: "Where there is *contradiction, ambiguity, or uncertainty* in the terms of the instrument, it may, especially against the party making or negotiating it, be so construed as to give effect to it according to the presumed intention of the parties." In illustration, reference is made to the case in which the note read, "Borrowed of J. S. 50£, which I promise *never* to pay;" and it was decided, that the word *never* must be read as *ever*, or wholly rejected. In *Coles v. Hulme*, 8 B. & C. 568 (15 Eng. C. L. 299), the word *pounds* was supplied, to effect the manifest intent of the parties. In *Evans v. Steele*, 2 Ala. 114, a promissory note was made in 1837, payable first of January "*one thousand forty*." By intentment, giving effect to the presumed intention of the parties, who are not supposed to be doing things which are vain and useless, the court did not hesitate to supply the words *eight hundred*, and read the note as payable January first, 1840. In *White v. Word*, 22 Ala. 442, the note read: "One day after I promise to pay," &c., and was declared upon generally, as payable *one day after date*. It was said: "The court will supply the word *date*, and intend the note was payable one day after its date." A decision similar in effect was made in *Pearson v. Stoddard*, 9 Gray, 199; and in *Coolbroth v. Purinton*, 29 Maine, 469, the word *dollars* was supplied, making the instrument that which it was morally certain the parties intended, a promissory note for the payment of a certain sum of money.

In the cases referred to, the instruments of themselves furnished the means for the correction of the errors, or supplying the omissions. This note does not furnish the means of removing the uncertainty or obscurity as to the day of payment which was intended, and which was omitted, presumably by inadvertence. It is very clearly settled, as is insisted by the counsel for the appellant, that parol evidence is inadmissible to explain a patent ambiguity, where the doubt arises on the face of the instrument. But parol evidence is admissible to aid in ascertaining the intention of the parties. Wills are often construed by the aid of evidence of the situation of the testator, the condition of his family, and of other circumstances surrounding him at the time of execution. "Contracts," it is said by C. J. CHILTON, in *Pollard v. Maddox* (28 Ala. 325), "must be interpreted in the light of surrounding circumstances. The occasion which gives rise to them, the relative position of the parties, and their obvious design as to the objects to be accom-

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plished, must be looked at, in order to arrive at their true meaning, and to carry out their intention if lawful."

The fact is not controverted, that the maker of the note intended the loan of his credit to the payees, to aid them in the transaction of their business as commission-merchants in the city of Mobile; and it is apparent that the making of negotiable paper was the form he intended the loan of credit to assume. The note is expressed to be payable and negotiable at a bank in the city. It may from these facts be safely assumed, that it was intended the note should be payable at such time as notes negotiable in bank were usually made payable, and not at such a remote period that it would be incapable of negotiation. The evidence of the time negotiable paper the banks would accept had to run, was material, to aid in determining the period of time it was intended should have been expressed for the payment of the note. That fact, taken in connection with the fact that no paper was taken for seventy-five weeks, months, or years, reduced it to a moral certainty, that the word omitted from the note was *days*, and that the note should be read and construed, as if that word immediately succeeded the numerical adjective *seventy-five*.—*Conner v. Routh*, 7 How. (Miss.) 176; *Nichols v. Frothingham*, 45 Me. 220.

The principle is well established by our decisions, that receiving negotiable paper as collateral security for the payment of a pre-existing debt, is not acquiring it in the usual course of business, and for a valuable consideration, entitling the holder to protection against the equities and defenses of the maker. 1 Brick. Dig. 276, §§ 347-8; *Connerly v. P. & M. Ins. Co.*, 66 Ala. 434. The authorities generally recognize accommodation paper, made for the purpose of enabling the payee to obtain credit from third persons (not by the agreement of the parties limited to an application to specific uses), as an exception to the rule; but a creditor, taking such paper as security for a pre-existing debt, may enforce it, notwithstanding the want of consideration between the original parties.—2 Am. Lead. Cases, 242. The exception is not recognized in this court, and the holder of such paper, taken upon no other consideration than as collateral security for a precedent debt, is subject to the defense of a want of consideration, which could be made as between the original parties.—*Miller v. Boykin*, 70 Ala. 469. The taking of such paper as collateral security for a debt presently created, is acquiring it in the usual course of business, upon a valuable consideration, entitling the holder to protection against equities or defenses existing between the original parties, of which he does not have notice.—*Connerly v. P. & M. Ins. Co.*, *supra*; *Miller v. Boykin*, *supra*.

The point of contention between the parties, in the City

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Court, was upon a matter of fact, which seems to have assumed two phases. The first was, whether the loan to James & Co. was complete, before the note in suit was transferred to the bank; and the second was, whether, if the loan was complete, the giving collaterals for its security was not a consideration inducing the bank to part with its money. As bearing upon these questions, we can not say that the fact that no portion of the money loaned was drawn from the bank, until after the collaterals were transferred, was irrelevant.

We remain of the opinion expressed in *Miller v. Boykin, supra*, that it is not essential, to constitute the bank a *bona fide* holder, the note in suit should, at the time of the loan, have been specified as one of the collaterals which would be transferred. It was security for which the bank was stipulating; security in the form of notes or bills the payees were capable of transferring, and which would be available if they made default in payment; and it was security in that form the payees stipulated to give. When the notes were transferred to, and accepted by the bank, the agreement of the parties was rendered specific and certain, and the bank became a holder for value.

We find no error in the rulings of the City Court, and its judgment must be affirmed.

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Indictment against Agent, for Embezzlement.

1. *Embezzlement, and fraudulent conversion of property, by agent; whether felony, or misdemeanor.*—An agent or servant who embezzles, or fraudulently converts to his own use, “any money or property which has come to his possession by virtue of his employment, must be punished, on conviction, as if he had stolen it” (Code, § 4377); and the larceny of an ox, or other domestic animal named in the statute, being now made a felony without regard to the value of the animal stolen (*Ib.* § 4358), the embezzlement of such animal by an agent is equally a felony without regard to value.

2. *Amending and repealing statutes.*—A statute may be amended, as well as repealed, by implication; and it is not necessary that the amending statute, in order to be free from constitutional objection, should even refer to the statute which it operates to amend.

3. *Averment of ownership, and of principal's name, in indictment.*—In an indictment for embezzlement by an agent, the name of his principal must be alleged; and it is the safer practice, also, to allege the ownership of the property, though this averment may not be necessary, and must be proved as laid.

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4. *Variance*.—Where the indictment alleges that the defendant embezzled property which came to his possession as the agent of S., while the proof shows that the property was placed in his possession by one T., who was the bailee of S., to be delivered to S., the variance is fatal, unless it is shown that S. ratified or recognized the appointment.

FROM the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

The indictment in this case charged, in a single count, that the defendant "did embezzle, or fraudulently convert to his own use, a certain ox or steer, the personal property of H. G. Stickney, which had been placed in his possession, to be by him driven or conveyed from Lowndes county to the city of Montgomery, and there by him delivered to said H. G. Stickney, and which said ox or steer was of the value of twenty-five dollars." The cause was tried on issue joined on the plea of not guilty. After conviction, the defendant moved in arrest of judgment, on account of the insufficiency of the indictment, but the motion was overruled.

On the trial, as the bill of exceptions shows, the State introduced H. G. Stickney as a witness, who testified that, within six months before the finding of the indictment, "he let one Fayette Thomas have a sorrel horse, for the purpose of trading or selling him, with the understanding, or agreement, that Thomas, in the event he disposed of the horse, was to account to him for forty-five dollars, or its equivalent;" that Thomas carried the horse to Lowndes county, and within a week or ten days afterwards, the defendant having been arrested on the charge preferred against him in this case, witness met him while under arrest, "and told him that Thomas had reported to him that he had traded the horse for a mule and two yearling steers, and had sent the steers by him (defendant) to be delivered to witness;" and that the defendant replied: "*That is all right. There are some money transactions between me and Thomas about those steers, and I sold them to get even with him.*" J. Levy, another witness for the State, testified that he bought a spotted steer from the defendant, at the price of ten dollars, "which was all it was worth;" that Thomas told him, before he paid the money, "that the steer belonged to Mr. Stickney;" and that when he informed the defendant of this, the latter replied: "*That is all right. I know what I am doing.*" The policeman in Montgomery, by whom the defendant was arrested, testified that, when informed of the cause of arrest, "defendant did not deny the charge, but said that the spotted steer had got away; and that the defendant spoke of the steers, during the conversation, as Mr. Stickney's. A witness for the defendant testified that Thomas, having the sorrel horse in his possession, came with the defendant to his house, and offered to

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trade the horse for a mule which the witness had, and ten dollars, but witness declined the offer; that the defendant then asked Thomas if he only wanted the mule and ten dollars for his horse, and Thomas answered "yes;" that defendant then told witness, "he would trade him the horse for the mule, if witness would give him the two yearling steers in his lot," one of which was the steer charged to have been sold by the defendant. The witness said, that he "consented to this proposition, and the trade was accordingly made—the horse turned over to witness, the mule and steers delivered to defendant, who then delivered the mule to Thomas, and at the same time handed him ten dollars, which Thomas received."

"This was all the evidence in the case. The court instructed the jury, among other things, that the indictment charged the defendant with the commission of a felony; and if they found him guilty, the punishment to be inflicted must be left to the court. The court charged the jury also, on the request of the solicitor, that if they believed from the evidence, beyond a reasonable doubt, that Thomas delivered two steers to the defendant, which the defendant knew to be the property of H. G. Stickney, and to be delivered by him to said Stickney, one of them being the steer mentioned in the indictment, and that defendant agreed to deliver said steers to said Stickney, then defendant became the agent of Stickney for that purpose; and if he fraudulently sold said steer to Levy, with intent to fraudulently appropriate to himself the proceeds of said sale to his own use, and did so appropriate them, and if said sale and appropriation took place in this county, within twelve months before the finding of this indictment, then the defendant is guilty as charged."

The defendant excepted to each of these charges, and requested the following charges, which were in writing: 1. "If the authority given to Thomas was only to sell or exchange the horse in question, then Thomas had no authority to constitute the defendant as the agent of Stickney to drive the cattle to the city of Montgomery." 2. "If the jury believe the evidence, they will find the defendant not guilty." The court refused the second of these charges, but gave the first, and, on giving it, further instructed the jury, *ex mero motu*, "that in ascertaining whether Thomas had authority from Stickney to employ defendant to drive the cattle, they might look, not only at the terms, but also at the nature of the employment; and if the latter was such as to necessitate the employment of other agents, then Thomas would have the right to employ them, though not expressly authorized to do so, and might have employed the defendant to drive the cattle as the agent of Stickney, if necessary to accomplish the object of the agency." To

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this additional affirmative charge, and also to the refusal of the second charge, exceptions were duly reserved by the defendant.

JNO. GINDRAT WINTER, for appellant.—(1.) The indictment was fatally defective, because it did not allege the agency with sufficient certainty, and that the property came to the defendant's possession by virtue of his agency. (2.) The indictment seems to have been framed on the idea, that the defendant was the agent of Stickney; while the evidence showed, if there was any agency at all, that he was the agent of Thomas. The variance was fatal. (3.) The indictment charged a felony, but the proof showed only a misdemeanor, if any offense at all. When the statute was enacted under which the indictment was found (Code, § 4377), the larceny of an ox, or other domestic animal, under \$25 in value, was only a misdemeanor; and the subsequent change in that statute, making the larceny a felony without regard to the value of the animal stolen, could not effect a corresponding change in the statute against embezzlement. The amending statute had no reference to the statute against embezzlement, and can not change it by implication. The General Assembly can not accomplish by indirection what it is forbidden to do directly. The incorporation of both of these statutes in the Code of 1876, can not change their legal operation or effect.—*Dane v. McArthur*, 57 Ala. 449.

II. C. TOMPKINS, Attorney-General for the State. (1.) Embezzlement by an agent, or the fraudulent conversion of property which came to his possession by virtue of his employment, is an offense of the same grade as the larceny of the property would be.—Code, § 4377. A statute may be amended by implication, without any express reference to it.—*Riggs v. Brewer*, 64 Ala. 282; *Steele v. The State*, 61 Ala. 214. Besides, the two statutes take effect from the time of the adoption of the Code of 1876, in which both of them are incorporated. (2.) The defendant received the oxen from Thomas, but for the purpose of delivering them to Stickney. Stickney could have recovered them from him by action, or maintained an action for their loss by negligence.—*Regina v. Callahan*, 8 Car. & P. 154; 2 Wharton's Amer. Crim. Law, §§ 1912, 1953-5; Redfield on Carriers, 234; *M. & W. P. Railroad Co. v. Edwards*, 41 Ala. 667.

SOMERVILLE, J.—The indictment is for the embezzlement of an *ox*, or *steer*, which the defendant is alleged to have fraudulently converted to his own use, contrary to the provisions of section 4377 of the present Code (of 1876).

We think the court did not err in charging the jury that the

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offense was a felony. The *larceny* of an ox or steer, without regard to its value, is made a felony by section 4358 of the Code, punishable by imprisonment in the penitentiary, or by sentence to hard labor for the county, for not less than two, nor more than five years. And the *embezzlement* of property, under the above section, is required to be punished just as the larceny of it is.—Code, § 4377. It is, in our judgment, immaterial, that the statute against larceny has been amended, since the one against embezzlement was enacted, so as to make that a felony which before may have been only a misdemeanor. It is a plain principle, that statutes may be *amended*, as well as be repealed, *by implication*; and it is not essential that the amendatory statute should even refer to the acts or sections which they thus operate to amend, in order to be free from constitutional objection. There is no clause in our constitution prohibiting this species of legislation.—Cooley's Const. Lim. 152.

The objection to the indictment, however, is well taken. The *gist* of the crime charged is embezzlement *by an agent*, of property which has come into his possession *by virtue of his employment, or agency*.—Code, § 4377. The indictment should, therefore, have alleged that the defendant was the servant or agent of some named principal.—Code, 1876, p. 997, Form No. 50; *Watson v. State*, 70 Ala. 13; *Hinderer v. State*, 38 Ala. 415; *Lowenthal v. State*, 32 Ala. 589.

It was unnecessary, perhaps, for the indictment to have alleged the ownership of the property embezzled, as a fact separate and distinct from the necessary inference of such ownership, based on the relation of principal and agent, and on the further fact that the property had come into the agent's or servant's possession by virtue of his agency or employment. The safer practice, however, is always to aver such ownership, varying the averments in several counts so as to meet the possibilities of a variance. But, where ownership is averred in such cases, it becomes material, and must be proved.

The defendant, under the proof made, was not the agent or servant of Stickney, who was alleged in the indictment to be the owner of the property embezzled. Thomas had received the horse from Stickney, with the understanding that he was to pay him (Stickney) forty-five dollars, or *its equivalent*. Thomas traded the horse for other property, including the ox or steer in question, which latter animal was placed in defendant's custody, to be by him delivered to Stickney. The defendant was selected by, and acted for Thomas, who was, therefore, his principal. If the animal had been destroyed by the malice of the agent, or lost through his negligence, it is plain that the loss would be Thomas', not Stickney's.—*Hinderer's case*, 38 Ala. 415, *supra*. If Stickney had recognized

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or indorsed the appointment of the defendant, he might then have been regarded as his agent. The charge of the court touching this aspect of the case was, in our opinion, erroneous.

The judgment must be reversed, and the cause remanded. In the meanwhile the defendant will be retained in custody, until discharged by due course of law.

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Bill in Equity for Injunction and Abatement of Nuisance.

1. *Private nuisance; jurisdiction of equity to abate; verdict and judgment at law.*—The jurisdiction of a court of equity to enjoin a private nuisance, at the suit of a person thereby aggrieved, compelling its abatement, is well established; and when the legal title of the party complaining is clear and undoubted, it is not necessary that his right should be first established by a verdict and judgment at law.

2. *Same; adequacy of legal remedies.*—When the injury complained of is permanent, continuous, or constantly recurring, though there may be a remedy at law, it is obviously inadequate; and the interference of a court of equity is necessary, to prevent irreparable injury and a multiplicity of suits.

3. *Same; easement for flow of waters from upper lands upon lower.* When two adjacent tracts of land belong to different persons, the upper or dominant tract has a natural easement or servitude in the lower, for the discharge of all waters falling or accumulating from natural causes on the surface; and any interference with this right, or obstruction of it, by the owner of the lower tract, by the erection of an embankment on his own land, whereby the waters are thrown back upon the upper tract, or their natural flow obstructed, is a private nuisance which a court of equity will enjoin and abate.

4. *Same; limitation of action or suit.*—By analogy to the statute of limitations at law barring an action for the recovery of lands (Code, § 2900), ten years is a bar in equity to a suit which seeks to enjoin and abate an embankment on land as a private nuisance to the owner of the adjacent upper lands.

5. *Husband's assent to embankment causing damage to wife's lands.* The assent of the husband to the construction or continuance of an embankment on adjacent lands, causing continuous injury to his wife's land, can not bar or preclude her from maintaining a suit in equity to enjoin and abate it.

APPEAL from the Chancery Court of Lowndes.

Heard before the Hon. H. AUSTILL.

The original bill in this case was filed on the 8th May, 1878, by Mary R. Norwood, a married woman, suing by her husband as next friend and trustee, against John Nininger, A. R. Nininger, and James Magee; and sought to enjoin and abate an embankment and certain ditches, which the defendants had con-

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86	240
72	277
104	188

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106	212
72	277
112	258
115	190

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112	299
72	277
126	369
126	590

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187	667
72	277
141	433

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structed on lands belonging to them, and by which, as the bill alleged, the water falling on complainant's lands, and naturally emptying into a stream called "Lake creek," was obstructed, dammed up, and thrown back on her lands, after every heavy rain-fall, destroying her crops, and permanently injuring her lands; also, an account of the damages thereby caused to the complainant's lands, and the condemnation of the defendants' lands to the satisfaction of the amount of damages thus ascertained. According to the allegations of the bill, there were two embankments, with connecting ditches, of which complaint was made; one constructed in 1862, by N. L. Brooks, who afterwards sold and conveyed his lands to the Niningers, and the other in December, 1877, by the defendants; and it was alleged, as to each of these, that they were made without the consent of the complainant, her husband, or her trustee, and against their remonstrance and protest, and were maintained and repaired by the defendants without such consent. The bill alleged, also, the insolvency of N. L. Brooks, and of each of the defendants.

The defendants jointly demurred to the bill, for want of equity, because the complainant had not established her right by a judgment at law, and because she had an adequate remedy at law. John Nininger afterwards died, and the suit was abated as against him. The other defendants filed a joint answer, in which they alleged that the ditch mentioned in the bill, and said to have been dug by N. L. Brooks, was in fact dug and kept open by said N. L. Brooks and his father, John W. Brooks (who was also the complainant's father, and who then owned the lands afterwards conveyed to her), for the purpose of enabling them to reclaim and cultivate the swamp lands through which the creek flowed; that in 1867, when N. L. Brooks sold and conveyed his lands to the respondents, he conveyed a small parcel, containing about five acres, to James H. Norwood, the complainant's husband, in consideration of his covenant to keep this ditch open and in proper repair; that this contract between N. L. Brooks and Norwood "was well known to complainant, and to her said trustee, who was a witness thereto, and was sanctioned and approved by her as a proper act of her husband in her behalf;" that the complainant and her husband "failed to keep clear the said eight-foot ditch, as said Norwood contracted to do, and said ditch so dug by respondents, which runs parallel with said eight-foot ditch and about thirty yards distant, was necessary to drain off the water which said former ditch was intended to drain; that no more water is now thrown upon complainant's lands than was thrown on them by said eight-foot ditch; and these respondents deny that any injury whatever

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results to complainant's lands on account of said ditch complained of, or by any act or omission of these respondents."

The chancellor overruled the demurrer to the bill, and, on final hearing on pleadings and proof, decreed as follows: "The complainant is not entitled to relief, so far as the old levee built by Brooks is concerned. The evidence shows that this levee and ditch follows pretty nearly what is called the 'run' of the old lake, and the complainant's testimony does not satisfactorily show that said levee, and repairs upon it, have been injurious to her land by throwing back the water upon it. As to the levee thrown up by the respondents, on the east side of the ditch dug by Nininger, commencing at the sixteen-foot ditch, and extending southerly to a point near the Brooks ditch and the public road, the court is of opinion that complainant is entitled to relief. It appears to the court that said levee obstructs the natural flow of the water from complainant's land, which flows naturally in a north-east direction, and causes the water, in times of freshets, to stand longer upon her lands than it would otherwise do. Said levee is decreed to be a nuisance, and it must be abated; and the respondent Nininger is ordered to abate and take away said levee thrown up by him, so that it shall no longer obstruct the flow of water, within ninety days from this date." The chancellor declined to estimate the damages, but ordered an issue to be submitted to a jury to determine the damages.

The defendants appeal from this decree, and here assign as error the overruling of their demurrer to the bill, and that part of the final decree granting relief to the complainant; and there is a cross-assignment of error by the complainant, on account of the refusal to grant any relief as against the old levee and ditch constructed by Brooks.

WILLIAMSON & COOK, for the appellants.—(1.) The right of an owner of land to occupy and improve it in such manner as he may see fit, either by changing the surface, or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated, with reference to that of adjoining owners, that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface, or flowing on to it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities, or in other directions than they were accustomed to flow. The right of a person to the free and unfettered control of his own land, above, upon, and beneath the surface, can not be interfered with, or restrained, by any considerations of injury to

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others, which may be occasioned by the flow of mere surface water, in consequence of the lawful appropriation of land by its owner to a particular use, or mode of enjoyment; nor is it material, in the application of this principle, whether a party obstructs or changes the direction and flow of surface water, by preventing it from coming within the limits of his own land, or by erecting barriers, or changing the level of the soil, so as to turn it off in a new course on his own lands. A party may improve his own lands, although he may thereby cause the surface water, whencesoever it may come, to pass off in a different direction, and in larger quantities than before.—*Gannon v. Hargadon*, 10 Allen, Mass. 106; *Goodale v. Tuttle*, 29 N. Y. 459; *White v. Chapin*, 12 Allen, Mass. 516; and other cases cited in Angell on Water-Courses, 7th ed., 119–22; also, *Taylor v. Fichas*, 64 Indiana, 167. (2) The husband's assent to the cutting of the ditches, and his approval of the work, was a full protection to the defendants against the complaint of the wife. As husband and trustee he had the full control and management of his wife's property, and the right to receive the rents, income and profits, without liability to account; and the wife can not repudiate or complain of his acts, while he continues her trustee. If the ditches injured the crops on the land, the husband alone could complain of it; and his consent took away his right of action, if any accrued to him.

W. R. HOUGHTON, and WATTS & SONS, *contra*.—(1.) By the old Roman law, all lands were burdened with the servitude of receiving and discharging the waters arising from natural causes, which naturally flowed down to them from higher lands.—Ad-dison on Torts, 70–71. That this is the law in this country, see *Hooper v. Wilkinson*, 15 La. Ann. 497; *Gillman v. Railroad Co.*, 49 Illinois, 484; *Livingston v. McDonald*, 21 Iowa, 160; *Laumier v. Francis*, 23 Mo. 181; *Martin v. Riddle*, 26 Penn. St. 415; *Butler v. Peck*, 16 Ohio St. 334; *Bellows v. Sackett*, 15 Barb. 96; *Griesemer v. Kaufman*, 26 Penn. St. 407; *Nevins v. Peoria*, 41 Illinois, 502; 30 N. Y. 519; 12 Minn. 451; 17 Texas, 688; 4 Geo. 241; *Rudd v. Williams*, 43 Ill. 385; *Greensdale v. Halliday*, 6 Bing. 379. (2.) When Nininger bought from Brooks, the lands were charged with this servitude, and he took them subject to it.—*Mayor v. Coleman*, 58 Ala. 570; *Mayor v. Jones*, 58 Ala. 654. (3.) As to the embankment and ditch constructed by Brooks, the complainant's right of action would only be barred by the lapse of twenty years, which would raise the presumption of a grant.—Angell on Water-Courses, § 201; *Polly v. McCall*, 37 Ala. 29; *Ricord v. Williams*, 7 Wheaton, 107; *American Co. v. Bradford*, 27 Cal. 367; *Williams v. Nelson*, 23 Pick. 144. (4.) That the

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complainant pursued the proper remedy, and that she was not concluded by the assent or conduct of her husband, is settled by the case of *Thomas v. James*, 32 Ala. 723.

BRICKELL, C. J.—The original bill was filed by Mrs. Mary R. Norwood, a married woman, owning a plantation, partly as a statutory, and partly as an equitable separate estate, to enjoin the defendants, who own an adjoining plantation, from continuing thereon levees, or embankments, causing waters to flow back upon the lands of the complainant, which, following their natural outlet, had always flowed therefrom over the lands of the defendants. The material averments of the bill are: That a stream, known as "Lake Creek," runs through the plantation of Mrs. Norwood. In times of heavy rains, large quantities of water escaping over the banks of this stream, upon the lands of complainant, with the accumulations of rain water, have a natural outlet therefrom over the lands of the defendants. To prevent these waters from flowing over and flooding their lands, the defendants have erected embankments, or levees, which cause them to flow back and accumulate upon the lands of the complainant, rendering them less fit for cultivation, and in other respects injuring them.

The manifest theory upon which the bill proceeds is, that the lands of the defendants are burdened with the servitude of receiving and discharging the waters flowing down to them from the lands of the complainant. If that theory can be maintained, the bill presents a clear case for the interference of a court of equity. The jurisdiction of the court to enjoin the erection, or the continuance of private nuisances, compelling their abatement, at the instance of a party aggrieved, is well established. When the legal right of the party complaining is clear and undoubted, and the wrong is not susceptible of adequate compensation in damages recoverable in an action at law, or is in its very nature and character continuous and constantly recurring, the interference of the court is necessary, to prevent irreparable injury and a multiplicity of suits. There is, in the contemplation of the court, a very just distinction between injuries in their nature temporary and fugitive, and injuries permanent, continuous, constantly recurring. In reference to temporary injuries, the intervention of the court may depend upon the adequacy of legal remedies. But, when the injury is permanent, continuous, constantly recurring, there may be a remedy at law, but its inadequacy is obvious. The court of law can not restore the party complaining to the condition in which he was before the wrong was done, and in which he has the legal right to remain unmolested; nor can it, by removing the cause, prevent the necessity for multiplied litiga-

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tion.—Wood on Nuisances, 812; High on Inj. §§ 501, *et seq.* Assuming that complainant has the clear legal right asserted, the defendants have invaded it, by obstructing the natural flow of the waters, causing them, in times of heavy rains, to flow back and accumulate upon the land of the complainant, submerging crops, interrupting cultivation, and deteriorating the fertility of the soil. The injury is permanent, continuous, and is of recurrence in all rainy seasons. It is irreparable injury, as that term is employed in a court of equity, for which legal remedies will not afford adequate redress, and against which a court of equity only can afford relief and protection.—Wood on Nuisances, 817. Nor, if the right of the complainant is clear—if, as matter of law, the lands of the defendants are burdened with the servitude claimed—is it essential that, as a condition precedent to the interference of the court, the right should have been established by a verdict and judgment at law. Substantial, actual injury has resulted, and there can be no necessity for sending the party to a court of law for the determination of a mere legal question, compelling submission to the wrong during the pendency of the action.—*Gardner v. Newburgh*, 2 Johns. Ch. 162; *Holman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. (1 McCarter) 335.

The remaining, and more important question, involved in the demurrer to the bill, is the existence of the right asserted by the complainant. Whether, as the owner of the land upon which the waters escaping from the creek in times when it is swollen by heavy rains, with the waters accumulating by the fall of rain, the complainant has a natural easement in the lands of the defendants, to the extent of the natural flow of these waters from her land, to and upon the lands of the defendants, is the controlling, decisive question. In *Hughes v. Anderson*, 68 Ala. 280, we considered the right of the owner of an upper parcel of lands to collect and concentrate the waters falling or originating upon his lands, increasing the flow, and discharging them in greater volumes upon the lower parcel. Following the case of *Karuffman v. Griesemer*, 26 Penn. St. 407, we held, that the owner of the upper or superior heritage had not the right to create new channels for the water falling or originating upon his lands, but that he could improve his lands, though the volume of water discharged by its accustomed channels was thereby increased. There are many interesting questions of growing importance, connected with the general subject of the rights of adjoining proprietors as to water falling or originating upon lands, but we confine our consideration to the single question the case presents.

The doctrine of the civil law is, that the owner of the upper or dominant estate has a natural easement or servitude in the

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lower or servient one, to discharge all waters falling or accumulating upon his land, which is higher, upon or over the land of the servient owner, as in a state of nature; and that such natural flow or passage of the waters can not be interrupted or prevented by the servient owner, to the detriment or injury of the estate of the dominant or any other proprietor. The doctrine is repudiated in some of the American courts, and it is asserted that the doctrine of the common law is, that there exists no such natural easement or servitude in favor of the owner of the superior or higher ground as to mere surface water; and that the owner of the inferior or lower estate may, if he choose, lawfully obstruct or hinder the natural flow of such water thereon, and, in so doing, may turn the same back upon, or off, or to, or over the lands of other proprietors, without liability for injuries occurring from such obstruction or diversion.—3 Wait's Actions and Defenses, 711; Angell on Water-Courses, §§ 108 *et seq.* (7th ed). In England, the rule seems firmly adhered to, that lands are burdened with the servitude of receiving and discharging all waters that naturally flow down to them from the lands of an adjoining proprietor upon a higher level. Any interference with, or obstruction of the servitude by the lower owner, to the injury of the owner of the dominant estates, subjects him to liability for the resulting damage.—Wood on Nuisances, 422. This rule, with an exception, *perhaps*, as to town or city lots, is followed generally in this country.—*Gillman v. Madison R. R. Co.*, 49 Ill. 484; *Adams v. Walker*, 34 Conn. 466; *Kauffman v. Griesemer*, 26 Penn. St. 406; *Miller v. Lanbach*, 47 Ib. 154; *Ogburn v. Comer*, 46 Cal. 346; *Butler v. Peck*, 16 Ohio St. 334; *Watts v. Clifton*, 22 Ib. 247; *Sweett v. Cutts*, 50 N. H. 439.

In the very carefully considered case of *Butler v. Peck*, said Brinkerhoff, J., "The principle seems to be established and indisputable, that when two parcels of land, belonging to different owners, lie adjacent to each other, and one parcel lies lower than the other, the lower one owes a *servitude* to the upper, to receive the water which *naturally* runs from it, providing the industry of man has not been used *to create the servitude*. Or, in other words more familiar to the students of the common law, the owner of the upper parcel of land has a *natural easement* in the lower parcel, to the extent of the natural flow of water from the upper parcel to and upon the lower." And again it was said: "The natural easement arises out of the relative altitudes of adjacent *surfaces* as nature made them, and these altitudes may not be artificially changed to the damage of an adjacent proprietor." In *Martin v. Riddle*, reported in a note to *Kauffman v. Griesemer*, *supra*, it is said by Lowrie, J.: "Where two fields adjoin, and one is lower than the other, the lower must necessarily be subject to all the natural flow of water

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from the upper one. The inconvenience arises from its position, and is usually more than compensated by other circumstances; hence the owner of the lower ground has no right to erect embankments, whereby the natural flow of the water from the upper ground shall be stopped; nor has the owner of the upper ground a right to make any excavations or drains, by which the flow of water is diverted from its natural channel, and a new channel made on the lower ground; nor can he collect into one channel waters usually flowing off into his neighbor's fields by several channels, and thus increase the waste upon the lower fields." And in the case of *Kauffman v. Griesemer*, Woodward, J., said: "Almost the whole law of water-courses is founded in the maxim of the common law, *Aqua currit, et debet currere*. Because water is descendible by nature, the owner of a dominant or superior heritage has an easement in the servient or inferior tenement, for the discharge of all waters which by nature rise in, or flow or fall upon the superior."

These parties, complainant and defendants, acquired the lands with full knowledge of their natural relations, and that from the one parcel, because of its altitude, and because water is in its nature descendible, the bursts of water from the creek in freshets, and the accumulations of rain water, had and found a natural outlet over the immediately adjacent lower lands. Whatever of advantage to the one, or of inconvenience to the other, resulted from the natural formation of the lands, entered into the consideration of the acquisition; and there can be no justice in suffering one party to increase his advantages, or to lessen his inconveniences, at the expense, and to the injury of the other. There can not be interminable contests between them as to the lessening or increasing the burdens nature has imposed. Either may improve his own parcel, so long as he keeps within a just application of the maxim, *Sic utere tuo, ut laedas non alienum*. The demurrer to the bill was not well taken, and was properly overruled.

There is more of seeming than real conflict in the evidence. The principal facts are not left in doubt or uncertainty. The inclination of the lands of the defendants is to the north-east, and to the south-west lie the lands of the complainant. The natural outlet for the water falling upon the lands of the complainant, and of the water originating thereon in the bursts of the creek in freshets, is over the lands of the defendants. These facts are uncontroverted, and the owners of these lands have for a long time been endeavoring to lessen the injury to them resulting from the natural flow of the waters. The first embankment or levee which is complained of, styled in the pleadings and the evidence the "ten-foot ditch," has been constructed by the defendant across the natural channel and direc-

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tion of these waters, extending for a distance of about seven hundred and fifty yards,retarding the natural flow of the water,raising it higher, and keeping it longer upon the lands of the complainant. We concur in the opinion of the chancellor, that the embankment or levee ought to be abated; that it is of continuous and constantly recurring injury to the complainant. As forming part of this embankment, must be included the embankment running north from the the hills, leaving the curve at the crossing of the running stream, as these objects are mentioned in the evidence, and indicated in the plat or map exhibited to the witnesses of the complainant. This embankment is not immediately connected with the longer one extending to the "sixteen-foot ditch." But, like the longer one, is directly across the natural outlet of the waters, and according to its length is chargeable with a proportion of the injury to the lands of the complainant.

The evidence leaves it in uncertainty whether the defendants have changed the levee or embankment called the "N. L. Brooks eight-foot ditch," to an extent that is injurious to the complainant. That embankment was constructed more than ten years prior to the commencement of this suit. By analogy to the statute limiting actions for the recovery of lands to ten years, the continuous throwing back of the waters by this embankment for that period would create the presumption that it was right-ful, barring legal and equitable remedies to redress the injury resulting from it.—*Wright v. Moore*, 38 Ala. 593. There being no material increase of the elevation of the embankment, no change of it disturbing the rights of the complainant, the present suit, so far as that embankment is matter of complaint, would fall within the bar of the statute. But, independent of that consideration, we can not say that the evidence discloses clearly that the embankment is of injury to the lands of the complainant.

No examination of the evidence is necessary to ascertain whether the husband of the complainant consented to, or approved the construction of these embankments. Such consent or approval would not legalize their construction and continuance, as against the complainant, working continuous injury to her lands.—*Thomas v. James*, 32 Ala. 723.

We find no error in the decree; and on each appeal, a judgment of affirmance must be entered.

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117	610

Mobile & Montgomery Railway Co. v. Wilkinson.

Action for Breach of Special Parol Contract.

1. *Parol evidence as to consideration of deed.*—The consideration clause of a deed is always open to unlimited explanation, except for two purposes: 1st, a party to the deed is not permitted to prove a consideration different from that expressed, if thereby the legal effect of the deed is varied; 2d, when payment of the consideration is recited in the deed, the grantor is not allowed, by disproving that recital, to establish a resulting trust in himself.

2. *Same.*—The owner of land having conveyed a lot to a railroad company, reciting in the deed, as its consideration, "one dollar" in hand paid, "and the benefits which will arise to the grantor from the ownership by the grantee of the property hereby conveyed," the deed does not estop him from showing, as an additional consideration, that the grantee verbally agreed to grade part of an adjacent lot belonging to the grantor, and to remove and rebuild that portion of his warehouse which was situated on the lot conveyed by the deed, and maintaining an action at law for the breach of such verbal agreement.

APPEAL from the Circuit Court of Butler.
Tried before the Hon. JAMES E. COBB.

BUELL & LANE, for appellant, cited *Mead v. Steger*, 5 Porter, 498; *Adams v. Thomas*, 54 Ala. 175; *Paysant v. Ware & Barringer*, 1 Ala. 160; *Beard v. White*, 1 Ala. 436; *Hair v. LaBrouse*, 10 Ala. 548; *Murphy v. Br. Bank*, 16 Ala. 90; *Evans v. Bell*, 20 Ala. 509; *Bryant v. Stephens*, 58 Ala. 636; *Couch v. Woodruff*, 63 Ala. 466; 1 Greenl. Ev. §§ 285, 304.

J. GAMBLE, and J. C. RICHARDSON, *contra*.

SOMERVILLE, J.—The question presented is one of estoppel, based on the recital of a particular consideration in a deed. In August, 1880, Wilkinson, the appellee, and his wife, conveyed to the appellant railroad company a certain lot, or parcel of land, in the town of Greenville. The consideration of the deed is recited to have been the sum of "one dollar" paid to the grantors, and "the benefits which will arise to the grantors from the ownership by the grantee of the property [therein] conveyed."

It was proposed by the plaintiff, on the trial, to show by parol testimony another consideration for the conveyance, *ad-*
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ditional to the particular one recited in the instrument itself—viz., that the grantee, the Mobile & Montgomery Railway Company, through its authorized agent, also agreed, in consideration of the execution of the deed, to grade a certain portion of a vacant lot belonging to the grantor, adjacent to the one conveyed, and to remove and rebuild such portion of plaintiff's warehouse as was situated on the lot described in the deed. This alleged oral agreement is made the basis of the present action, and damages are claimed for its violation. The evidence of this additional consideration to the deed was admitted, against the objection of the defendant; and this ruling of the court is assigned for error.

We are of opinion, that the evidence was very clearly admissible. It was not obnoxious to the rule, that contemporaneous parol evidence is inadmissible to contradict or vary the legal effect of a written instrument. The purpose is not to assail the legal effect of the deed, which can be done only by varying the title conveyed, or character of estate granted, or qualifying the covenants assumed by the grantor.—*McGehee v. Rump*, 37 Ala. 631. The effect of the evidence is simply to prove a consideration not mentioned in the deed, additional to the one which is mentioned, and of the same general kind or nature,—each being valuable. The suit is not on the instrument, but on an alleged promise averred to be an omitted consideration for the execution of the instrument, being merely *incidental and collateral* to it.—*Davenport v. Mason*, 15 Mass. 85; *Swisher v. Swisher*, 1 Wright, 755; *Thomas v. Barker*, 37 Ala. 392.

Although the authorities are greatly in conflict, we think it may now be considered as the better doctrine, that *the consideration clause of a deed is always open to unlimited explanation*, "except for two purposes: first, it is not permissible for a party to the deed to prove a *different consideration*, if such change *vary the legal effect* of the instrument; and second, the grantor in a deed, who acknowledges the receipt of payment of the consideration, will not be allowed, by disproving that fact, to establish a *resulting trust* in himself."—*Henry v. Murphy*, 54 Ala. 246; *McGehee v. Rump*, 37 Ala. 631; *Wilkinson v. Scott*, 17 Mass. 249. Mr. Wharton says: "Where the recital *involves a contract*, it estops; if it does not involve a contract, it operates only as a unilateral general admission, and is open to explanation."—2 Whart. Ev. § 1040. It is said by Mr. Bishop, that "the consideration, which is not the promise of the parties with its special terms and limitations, but merely the thing of value whereby they were moved to make the promise, ought always to be open to inquiry by oral evidence. The better doctrine, certainly in principle, holds it to be so."

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Bish. on Contr. § 65. These views are fully supported by the authorities, including the adjudged cases.—*Cowan v. Cooper*, 41 Ala. 187; *Mason v. Buchanan*, 62 Ala. 111; *Reader v. Helms*, 57 Ala. 440; *Henry v. Murphy*, 54 Ala. 246; *McGehee v. Rump*, 37 Ala. 651; *Thomas v. Barker*, 37 Ala. 392; *Eckles v. Carter*, 26 Ala. 563; 1 Bish. Contr. § 65; Bump on Fraud. Conv. 577, 579; 1 Greenl. Ev. § 281; 2 Whart. Ev. § 1042, note 7; *Goodspeed v. Fuller*, 46 Me. 147; *Quinby v. Stebbins*, 55 N. H. 422.

The judgment is affirmed.

72	288
93	475
93	481

72	288
114	84
72	288
133	598

Gachet v. Warren & Burch.

Action by Purchaser for Breach of Warranty on Sale of Oats.

1. *Warranty on sale of goods.*—In the absence of fraud, the general rule of the common law is, that the buyer of goods takes them at his own risk, in the absence of an express warranty, unless a warranty is implied from the nature and circumstances of the sale.

2. *Same, on sale of goods by description.*—When goods are sold by description, and the buyer has not an opportunity of inspecting them, it is of the essence of the contract that the goods delivered shall answer to the description; and there is, also, an implied warranty that the article furnished shall be merchantable.

3. *Same, on sale by manufacturer or dealer.*—When a manufacturer or dealer contracts to supply an article which he makes, or in which he deals, knowing that the purchaser wishes to apply it to a particular purpose, and necessarily trusts to his judgment or skill, there is an implied warranty on his part that the article shall be reasonably fit for the purpose to which it is to be applied; but, if he contracts to sell a known and described article, and delivers that article, though he may know that the purchaser intends it for a specific purpose, there is no implied warranty that it is suitable for that purpose.

4. *Same, on sale by sample.*—On a sale of goods by sample, the seller only warrants that the bulk of the goods delivered shall correspond with the sample.

APPEAL from the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

This action was brought by Nicholas Gachet, who was a planter and farmer residing in Bullock county, against the appellees as late partners, a mercantile partnership doing business in the city of Montgomery, to recover damages for the breach of an alleged warranty on the sale of two hundred and fifty bushels of "rust-proof oats" by the defendants to the plaintiff, in February, 1880; and was commenced on the 7th March, 1881. As the pleadings are set out in the record, it appears

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that the cause was tried on issue joined on the plea of the statute of limitations of one year, which was the only plea filed by the defendant. On the trial, as the bill of exceptions states, the plaintiff testified, as a witness for himself, that he, in company with one West, went to the defendants' store in Montgomery, and inquired of J. R. Warren, one of the defendants, "whether he had rust-proof oats;" that Warren asked how many bushels they wanted, and, being told that they wanted three hundred bushels, "said that he then had only about fifty bushels of rust-proof oats, but had a car-load in transit which would arrive in a day or two;" that he then asked said Warren, "if he would guarantee the oats to be rust-proof oats," and Warren replied, "that he would;" that he then agreed to take the fifty bushels on hand, and two hundred and fifty bushels of the oats in transit, and made arrangements for the deposit of the money (\$250) with a friend in Montgomery, and took a sample of the oats on hand; that he did not recollect that he told said Warren, at the time, "that he wanted the oats to plant, but he supposed Warren knew it, as he told him that it would do if he could get the oats in five days, as he had enough to keep his plows going for that time;" that Warren "gave him a small quantity of the oats on hand, not exceeding a handful, and said that the oats he would ship would be like the sample." He further testified to the subsequent shipment and receipt of the oats, and produced the receipt for the money paid, in which the goods were described as "250 bu. R. P. Oats;" that he let West take the fifty bushels of oats on hand, and himself planted two hundred bushels of the others when received, in suitable ground, and gathered only about two hundred bushels from the crop, instead of twenty-five hundred bushels, which would have been an average crop if the oats had not rusted. Said West, who was examined as a witness for the plaintiff, testified to the same effect, as to the negotiations and terms of the contract between the parties, except that "he did not hear defendant guarantee the oats sold to plaintiff;" and he further testified, that the fifty bushels which he obtained and planted "produced a good crop, and did not rust." Warren, testifying as a witness for the defendants, stated the terms of the negotiation and conversation in substantially the same words, but denied that he gave any warranty that the oats to be delivered should be "rust-proof oats," but only promised that they should correspond with the sample which the plaintiff took; and that the oats subsequently delivered did correspond with those from which the sample was taken, "and was known and called 'rust-proof oats.'" Other witnesses introduced by the defendants testified, that "rust-proof oats" was a variety well known to commerce, which had

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seen and in and around Montgomery for several years, and was so distinct from the other varieties "that a person of ordinary intelligence, on comparing a sample with any other variety, could easily tell the difference, which was very marked."

This being the substance of the evidence, all of which the defendant's exceptions purports to set out, the court thereupon charged the jury, on the request in writing of the defendant, as follows:

"1. If the jury believe from the evidence that, on the 14th of February, 1880, the plaintiff and West went into the defendant's store, and asked him if he had any rust-proof oats; and that defendant replied, that he did not have the amount they wished, but would have a car-load in a few days; and that defendant then agreed, after some negotiations between the parties, to sell and deliver said oats to plaintiff; and that there is a kind of oats, known to the commercial world as 'rust-proof oats'; and that the oats delivered by defendant to plaintiff was the kind of oats so known and designated,—then plaintiff is not entitled to recover, although the oats may have rusted; and before they can find for the plaintiff, the evidence must satisfy them that the oats delivered to him by Warren was not the kind of oats known to the commercial world as 'rust-proof oats.'

"2. If the jury believe, from the evidence, that there is a variety of oats known and designated as 'rust-proof oats'; and that the contract between the plaintiff and the defendant was for the purchase of 'rust-proof oats'; and that the oats delivered by defendant to plaintiff was the oats so known and designated,—then plaintiff is not entitled to recover, though the oats rusted, and the plaintiff's crop failed.

"3. If the jury believe, from the evidence, that there is a kind of oats known to commerce as the 'rust-proof oats'; and that the plaintiff inquired for, and the defendant agreed to sell him such oats; and that the oats delivered to plaintiff were the oats so known and designated,—then the plaintiff is not entitled to recover, even if the jury should believe that the oats rusted, and that thereby plaintiff's crop was a failure.

"4. If the jury believe, from the evidence, that there is a variety of oats known to commerce as the 'rust proof oats'; and that the defendant guaranteed to plaintiff that the oats he was to sell and deliver to him should be the 'rust-proof oats'; and that the oats delivered were of the variety known and designated as 'rust-proof oats,'—then plaintiff is not entitled to recover in this action.

"5. If the jury believe, from the evidence, that there is a variety of oats known and designated in commerce by the

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name of 'rust-proof oats'; and that the defendant agreed and guaranteed to sell and deliver to plaintiff the 'rust-proof oats'; and that the oats which he did deliver was the oats so known and designated,—then there was no breach of contract on the part of the defendant, and the plaintiff is not entitled to recover, even though the jury may believe that the oats rusted.

"6. The burden of showing that the oats delivered by the defendant was not the kind of oats which he contracted to deliver, is upon the plaintiff; and unless he has satisfied the minds of the jury, by the evidence adduced, that the oats delivered was not the kind or variety so agreed to be delivered, then they must find for the defendant.

"7. If the jury believe, from the evidence, that the defendant furnished the plaintiff with a sample of the oats which he was to deliver; and that the contract between them was, that the oats to be delivered were to be of the same character and quality as such sample; and that plaintiff took such sample home with him, and, when the oats were delivered to him, compared them with the sample, and found and accepted them as the same character and quality of oats,—then the plaintiff can not recover in this action, and the burden of showing that the oats delivered were not of the same character and quality is on the plaintiff."

The plaintiff excepted to each of these charges, and he now assigns them as error.

ARRINGTON & GRAHAM, and E. P. MORRISSETT, for the appellant, cited *Gerst v. Jones*, 32 Gratt. 518, or 34 Amer. Rep. 773; *Jones v. Just*, 3 Q. B. 197; *Van Wyck v. Allen*, 69 N. Y. 61, or 24 Amer. Rep. 136; *Bragg v. Morrill*, 24 Amer. Rep. 104, and note; 5 Wait's Actions and Defenses, 554.

TROY & TOMPKINS, *contra*, cited *Danforth v. Laney*, 28 Ala. 274; *Chanter v. Hopkins*, 4 M. & W. 399; *Allen v. Lake*, 5 Exch. 779; *Wieler v. Schilizzi*, 17 C. B. 619; *Dounce v. Dow*, 64 N. Y. 411; *Fraley v. Bispham*, 10 Penn. St. 320; *Tonell v. Gatewood*, 3 Illinois, 22; *Mixer v. Coburn*, 11 Mete. 559; *Dollard v. Potts*, 6 Allen, N. B. 443; *Gossler v. Eagle Sugar Refinery*, 103 Mass. 331; *Sweett v. Shumway*, 102 Mass. 365; *Jailing v. Kingsford*, 13 C. B. (N. S.) 447; *Winsor v. Lombard*, 18 Pick. 57; *Prideaux v. Bunnnett*, 1 C. B. (N. S.) 613; *Port Carbon Iron Co. v. Grove*, 68 Penn. St. 149; *Whitaker v. Eastwick*, 75 Penn. St. 229; 9 B. & C. 259; 2 M. & G. 279.

BRICKELL, C. J.—The assignments of error present no other question, than the correctness of the instructions given

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the jury at the instance of the defendants, on the trial in the court below. Six of these instructions assert, in varying language, and by reference to particular facts in evidence, that if the contract between the parties was for the sale and delivery of seed-oats, of the species known in the market as "*rust-proof oats*," and the oats delivered were of that species, there is no liability upon the sellers, although the product of the oats rusted, and they knew the purchaser was buying for the purpose of sowing and raising a crop. One or more of the instructions, also, affirm that the burden of proof rested upon the purchaser, to show that the oats delivered were not of the species known as "*rust-proof oats*."

In the absence of fraud, the general rule of the common law, as applicable to sales, so far as quality is concerned, is embodied in the maxim, *Caveat emptor*. The buyer takes the goods at his own risk, if there be not an express warranty by the seller; or unless, from the nature and circumstances of the sale, a warranty is implied.—*Ricks v. Dillahunt*, 8 Port. 130; *Barnett v. Stanton*, 2 Ala. 181. When goods are sold by description, and the buyer has not the opportunity of inspecting them, it is a part of the contract—it is of the very essence of the undertaking—that the goods delivered shall answer to the description; otherwise, the buyer could contract for one thing, and the seller deliver another and different thing. In such case, there is also an implied warranty, that the thing delivered shall not only answer the description, but that as such thing it shall be salable or merchantable.—Benjamin on Sales, § 656. The purchaser can not insist that the thing shall be of any particular quality or fineness, but he has the right to demand that it shall be a merchantable article, answering to the description of the contract. If it be not, though it may bear the denomination, it does not answer to the description—it is not in fact the thing sold.

"Where a manufacturer, or a dealer, contracts to supply an article he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is, in that case, an implied term of warranty, that it shall be reasonably fit for the purpose to which it is to be applied." *Pacific Guano Co. v. Mullen*, 66 Ala. 582; Benjamin on Sales, § 157. But, if a manufacturer, or dealer, contracts to sell a known and described thing, although he may know the purchaser intends it for a specific use, if he delivers the thing sold, there is no implied warranty, that it will answer, or is suitable for the specific use, to which the purchaser intends applying it. *Chanter v. Hopkins*, 4 Mees. & Wels. 399; *Hoe v. Sanbone*, 21 N. Y. 552; *Bartlett v. Hoppock*, 34 N. Y. 118; *Dounce v.*

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Dow, 64 N. Y. 411; *Port Carbon Iron Co. v. Grove*, 68 Penn. 149; *Gossler v. Eagle Sugar Refinery*, 103 Mass. 331; 1 Pars. Contr. 586.

These are all recognized principles of the law of sales, and the several instructions to the jury we are considering, in effect, affirm them. Whether the sale was of the oats known in the market as "*rust-proof oats*," and whether the oats delivered corresponded to that description, were facts fairly submitted for the determination of the jury. If these facts were found affirmatively by the jury, though the sellers were dealers in oats, and knew the purpose to which the buyer intended to apply them, there can not be said to be any express stipulation by them, that the oats were suitable for that particular use; nor any implied warranty, that for it they were reasonably fit. The kind of oats suitable for his use, the purchaser selects—he does not rely on the judgment or skill of the seller to select for him. The judgment or skill of the seller is trusted only to providing oats of a designated species. When oats of that species were furnished, not unsalable, unmerchantable, the contract was performed by the sellers. And if there was a warranty, or representation by them, that the oats were of that species, the warranty or representation was not broken. The oats may not have produced as the buyer expected; his expectations were capable of disappointment, though the sellers kept the contract, made no false representations, and no warranty which was broken.

The affirmative facts essential to the plaintiff's recovery, in the aspect of the case presented by the instructions, were, that the defendants had delivered oats not corresponding to the oats sold; or had made a warranty or representation of the quality of the oats, which was broken, or untrue. The burden of proving these facts necessarily rested upon him, and could not be discharged, unless of the truth of the facts the jury were satisfied. This is the substance of the instructions, and there is no reason for doubting their correctness.—*Harris v. Bell*, 27 Ala. 520; *Jarrell v. Lillie*, 40 Ala. 271. In all actions upon warranties, it is necessary for the plaintiff to prove clearly and positively the breach thereof.—Chitty on Contracts, 402 *a*.

The seventh instruction affirms no more than that, if the sale was by sample, and the oats delivered corresponded to the sample, there was no right of recovery in the plaintiff. Upon a sale by sample, all that the vendor warrants is, that the bulk of the goods delivered shall correspond, or be equal to the sample. Benjamin on Sales, § 648. The burden of proving that they do not, must rest upon the buyer, who accepts and uses the goods as equal to the sample.

Affirmed.

Butts v. Broughton.

Bill in Equity for Redemption under Mortgage.

1. *Revision of chancellor's decision on facts.*—This court will not disturb the chancellor's decision on a disputed question of fact, when the record does not clearly show that he erred.

2. *Usury in mortgage debt; who may plead.*—It may be seriously questioned, under the decisions of this court, whether a mortgage can be impeached on the ground of usury in the secured debt, by any other person than the mortgagor himself, or his personal representative; though the current of modern authority supports the contrary view.

3. *Bill to redeem; who may file.*—A bill to redeem under a mortgage may be filed by any one who owns the mortgagor's equity of redemption, or any subsisting interest therein, by privity of title with him, whether by purchase, inheritance, or otherwise; and under this principle, the widow of the mortgagor, who joined with her husband in the execution of the mortgage, and who claims a homestead in the premises, may be joined with the heirs in a bill to redeem.

4. *Alienation of homestead; signature and acknowledgment by wife.* Under the provisions of the constitution of 1868, prior to the passage of the act approved April 23, 1873, a mortgage, or other alienation of the homestead, acknowledged by husband and wife, and certified in the form prescribed by the statute for ordinary conveyances, was sufficient to convey the homestead.

5. *Same; equitable mortgage created by recital in note.*—A declaration and recital in a promissory note, executed by a mortgagor to the mortgagee, that it "shall be covered by the mortgage," or "shall be subject to the mortgage," shows an intention to make the mortgage a valid security for the debt, and creates an equitable lien or mortgage on the premises for its payment; but, if the note is signed by the husband only, the equitable lien of the note does not attach to the homestead included in the lands conveyed.

6. *Mortgagee's liability for rents.*—When the mortgagee takes possession of the premises after the law-day of the mortgage, he is liable as a trustee for the rents and profits, including not only the rents which he collects, but also such as he has failed to collect through gross negligence, willful default, or fraud.

7. *Same.*—Under this principle, as applied in this case, the mortgagee having taken possession, and then rented the premises to the widow and adult heirs of the deceased mortgagor; on the statement of the account against him, under a bill to redeem filed by the widow and all the heirs, he was held liable for the rents as if he had collected them.

APPEAL from the Chancery Court of Butler.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 5th of March, 1880, by the widow and children of Benjamin Butts, deceased, against John T. Broughton, as the administrator of his deceased wife, Mrs. Sarah C. Broughton, and their several children as heirs at

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law; and sought a redemption of certain lands, which had been mortgaged by said Benjamin Butts in his life-time to Mrs. Broughton, an account of the mortgage debt, and general relief. Benjamin Butts died in October, 1873, being in possession of the mortgaged lands at the time of his death; and Mrs. Sarah C. Broughton, the intestate and ancestor of the defendants, died, intestate, in January, 1879. The mortgage to Mrs. Broughton was dated the 13th March, 1871; was signed by said Benjamin Butts and his wife, acknowledged by them, on the day of its date, before a justice of the peace, and by him duly certified as an ordinary conveyance; and purported to be given to secure the payment of a promissory note for \$724.50, signed by said Benjamin Butts, of even date with the mortgage, and payable on the 12th December, 1871. The mortgage described the lands conveyed by it, as containing 508.50 acres; but, in the former conveyances referred to, they are described as containing 580.50 acres. These lands were conveyed by Moses Pierce, by mortgage dated the 4th November, 1867, to said John T. Broughton, to secure the payment of a promissory note for \$837, with interest; and this note and mortgage having been transferred by said Broughton to Mrs. L. Culberson, the mortgage was foreclosed by her, by sale under a power therein contained, on the 20th March, 1869. Benjamin Butts became the purchaser at that sale, and received a conveyance from Mrs. Culberson; and on the same day he executed to her a mortgage on the lands, in which his wife joined, to secure the payment of his promissory note for \$951, given for the purchase-money. This note and mortgage were afterwards transferred by Mrs. Culberson to Mrs. Sarah C. Broughton. The note not being paid at maturity, a new note was executed by said Butts to Mrs. Broughton, on a settlement had between them in December, 1869. This note was dated the 11th December, 1869, payable on the 1st December, 1870, and was for \$1,200; and a mortgage on the lands, dated December 18th, 1869, was executed by said Butts and his wife to secure its payment. This note not being paid in full at maturity, a new note and mortgage were given on the 13th March, 1871, for the balance then ascertained to be due,—this latter being the mortgage under which the complainants now seek a redemption and account, alleging usury in the renewed notes, and payment of the entire debt.

The administrator of Mrs. Broughton denied the charge of usury, and claimed an indebtedness against said Benjamin Butts, not only on account of the note secured by the mortgage, but also for other debts evidenced by the notes of said B. Butts, which were produced. One of these notes was for \$417.80; was dated, as copied in the record, the 20th March, 1870, and

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payable on the 12th December, 1873, to Mrs. S. C. Broughton or bearer; and contained a recital, or declaration, in these words: "This note shall be covered by a mortgage made by myself and wife, March 13th, 1871, and payable on 12th December, 1871, to Mrs. Sarah C. Broughton, said mortgage being unsettled, and recorded in book T.," &c. The other note was for \$320, and was dated the 10th August, 1871; purported to be given "for money borrowed for use of farm;" was payable to Mrs. S. C. Broughton, and recited on its face that "this note shall be subject to a mortgage held by her for purchase-money of my land, made March 15th, 1871, and due December 12th, 1871." It further appeared that, after the death of Mrs. Broughton, and the grant of letters of administration on her estate, Butts made various payments on the debts secured by the mortgage; and that after his death, on an accounting between his widow and adult heirs, as parties on the one hand, and the personal representative of Mrs. Broughton on the other, it being admitted that the mortgage debts could not be paid, the possession of the lands was surrendered to said administrator, and the widow and adult heirs agreed to hold as his tenants. This arrangement was made in the fall of the year 1874, and continued, or was renewed from year to year, until a short time before the filing of the bill.

The chancellor ordered a statement of the accounts by the register, and reserved all other questions until the coming in of the master's report. On the coming in of the report, to which numerous exceptions were reserved by the complainants, he held that "the allegations and proof are not sufficient to support the charge of usury in the transactions between the parties, and that the calculations should begin with the mortgage last given, the amount of the debt therein stated being the sum due at that time;" also, that the notes for \$320 and \$417.80, respectively, should be included in the account as a part of the mortgage debt, and that "it would be inequitable to charge the defendants with the rents for the year 1875, while the complainants were in possession and paid no rents." On the account as finally stated by the register, and confirmed, the balance due on the mortgage debt, including the two notes above described, was ascertained to be \$1,412.77; and the chancellor rendered a decree in favor of the complainants, that they should be allowed to redeem on payment of that sum to the register within sixty days, and ordering a sale of the lands in foreclosure of the mortgage on default of payment by them.

The appeal is sued out by the complainants, and they here make sixteen assignments of error, all founded on the chancellor's instructions to the register, or his rulings on exceptions to the register's report.

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WATTS & SONS, and POSEY & STALLINGS, for the appellants.

(1.) A simple arithmetical calculation shows that usury was reserved in the several settlements which resulted in the note and mortgage under which the right to a redemption and account is claimed. (2.) The widow and the heirs of the deceased mortgagor might join in a bill to redeem, and might set up the defense of usury.—7 Wait's Actions & Defenses, 624-5; Tyler on Usury, §§ 403-08; Jones on Mortgages, vol. 1, p. 644; 2 *Ib.* §§ 1062-67; *Gray v. Brown*, 22 Ala. 262; *Hunt v. Acre*, 28 Ala. 580; *Stephens v. Muir*, 8 Indiana, 352; *Safford v. Vail*, 22 Illinois, 327; *McAlister v. Jerman*, 32 Miss. 142; *McGuire v. Van Pelt*, 55 Ala. 344; *Wilson v. Knight*, 59 Ala. 172; *Rogers v. Torbut*, 58 Ala. 527. (3.) The several renewals of the note did not purge it of the usury.—*Pearson v. Bailey*, 23 Ala. 537; *Eslava v. Crampton*, 61 Ala. 507. (4.) Whatever effect might be given to the two small notes, as against Benjamin Butts, who alone signed them, they are not binding on the widow, who has a right of dower and homestead.

GAMBLE & PADGETT, *contra*.—(1.) The widow and adult heirs, who participated in the settlement with Broughton, when they gave up the land, and agreed to hold as tenants, are estopped from maintaining this bill; and the other complainants can have no relief on account of the misjoinder. (2.) If entitled to redeem, they will be required to pay all of the debts due from the mortgagor to the mortgagee.—5 Wait's Actions and Defenses, 433; Fomb. Eq. 537; *Grigg v. Banks*, 59 Ala. 311. (3.) On the disputed question of usury, the record does not show enough to put the chancellor in error.—*Rather v. Young*, 56 Ala. 94.

SOMERVILLE, J.—We can not clearly see that the chancellor erred in holding the transactions between the decedent, Benjamin Butts, and the appellee, Broughton, to be free from the taint of usury. His ruling on this point must, therefore, be permitted to stand in the present state of the evidence. *Derrick v. Brown*, 66 Ala. 162; *Donegan v. Davis*, *Ib.* 362; *Rather v. Young*, 56 Ala. 94.

It may be seriously questioned, moreover, whether a mortgage debt can be impeached for usury by any other person than the mortgagor, or his personal representative. It has generally been held in this State to be a defense purely personal, and capable of being waived by the debtor, or his personal representative, who, it has some times been said, alone have the right to plead it.—*Cain v. Gimon*, 36 Ala. 168; *Sayre v. Fenno*, 3 Ala. 458; *Cork v. Dyer*, 3 Ala. 643; *Baskins v. Calhoun*, 45 Ala. 582; *McGuire v. Van Pelt*, 55 Ala. 344; *Gray*

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v. Brown, 22 Ala. 262. It may be conceded, however, that the current of modern authority supports the contrary view. 1 Jones on Mortgages, § 644. And in *Hunt v. Acre*, 28 Ala. 580, it seems to have been assumed that the right to set up the defense of usury could be claimed by the *heirs* of the mortgagor on coming into equity to redeem the mortgaged premises. But this point we do not decide.

A bill to redeem a mortgage may be filed by any one who owns the mortgagor's equity of redemption, or any subsisting interest in it, by privity of title with him, whether by purchase, inheritance, or otherwise. This principle would embrace not only heirs of the mortgagor, but also his widow who had joined with him in the mortgage, so as to have released her dower. 2 Jones on Mortgages, §§ 1055, 1067; *Eaton v. Simonds*, 14 Pick. (Mass.) 98; *Lamb v. Montague*, 112 Mass. 352. So, an estate of homestead in the mortgaged premises entitles the holder of it to redeem.—2 Jones on Mortgages, § 1069.

Mrs. Lucinda Butts was, in view of these principles, a proper party complainant to the present bill.

The mortgage debt of March 13, 1871, for seven hundred and twenty-four 50-100 dollars, and accrued interest, was properly decreed to be a valid lien on the mortgaged premises. The mortgage was executed prior to the statute of April 23, 1873, and the acknowledgment of its execution by the mortgagor and his wife, certified in the form prescribed by statute for ordinary conveyances, satisfied the requirements of the constitution of 1868, then of force, as to the wife's voluntary signature and assent to the alienation of the homestead.—*Lyons v. Conner*, 57 Ala. 181; Const. 1868, Art. xiv, §§ 2 and 3. This debt is shown by the evidence, however, to have been satisfied by the rents of the mortgaged property collected by the appellee, Broughton.

So, the other two notes executed by the decedent, Benjamin Butts, — the one for four hundred and seventeen 50-100 dollars, dated March 20th, 1870; and the other for three hundred and twenty dollars, dated August 10th, 1871,—clearly constituted *an equitable lien* upon all of the lands included in the first mortgage, excepting such portion of it as may have been lawfully exempted as a homestead, under the laws then of force governing the subject of homestead exemptions. The express declaration is made in them, that they shall be "covered by," or "subject to" the prior mortgage; and this sufficiently evinced the intention of the maker to create an equitable lien, or mortgage, on the premises in question. In such cases, the form or language of the instrument is not material, except as an index of the intention of the parties. If it was intended as a security for a valid debt, and this is deduci-

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ble from the instrument itself, it must be construed to be an equitable mortgage. — 1 Jones on Mortgages, §§ 166, 167; *Newlin v. McAfee*, 64 Ala. 357; *Donald v. Hewitt*, 33 Ala. 534.

But it is an important fact, overlooked by the chancellor in his decree, that these notes were signed by the husband alone; and although they may be declared to be an equitable lien on the lands in controversy in excess of the homestead, as to the latter they can have no legal operation. As mortgages, they must be held void so far as concerns the *homestead*, because they were executed without the voluntary signature and assent of the wife.—*Garner v. Bond*, 61 Ala. 84; *McGuire v. Van Pelt*, 55 Ala. 344; Thompson on Homestead, §§ 474, 477. We are not to be understood as deciding that the voluntary signature and assent of the wife to a mere equitable mortgage would come within the influence of the provision in the constitution, authorizing a “mortgage or other *alienation* of the homestead.” See *Jenkins v. Harrison*, 66 Ala. 345.

We think the chancellor erred, in not confining the lien of the above-described notes to the excess of the lands over and above the homestead estate, as allowed by the constitution of 1868.—Const. 1868, Art. xiv, §§ 2 and 3; *Garner v. Bond*, 61 Ala. 84, *supra*.

It was also error, not to charge the mortgagee with reasonable rents for the year 1875. The rule is, that the mortgagee is entitled to the rents and profits after the law-day of the mortgage, and after his entry on the mortgaged premises he is considered a trustee in respect to his liability for them.—1 Jones on Mortgages, § 712. He is not only liable for such rents and profits as he may collect from others, but also for such as he has failed to collect through gross negligence, willful default, or fraud.—*Dozier v. Mitchell*, 65 Ala. 511; *Barron v. Paulling*, 38 Ala. 292; 3 Lead. Cases Eq. (Hare & Wall.), 891–892. The mortgagee was in possession of the premises in the year 1875, having entered under the mortgage, and, through her agent and husband, the appellee, had undertaken to rent them to the widow and some of the adult heirs. She thus possessed a claim against the lessees for such rent, and was justly chargeable with it in the account taken by the register, which is shown to have been about the sum of three hundred dollars. The fact that the lessees permitted some of the other complainants, *ex gratia*, to remain on the premises during this time, does not affect the question of the mortgagee's liability.

For the above errors, the decree of the chancellor is reversed, and the cause remanded.

[Stoudenmire v. DeBardelaben.]

72	800
113	579
72	300
130	591

Stoudenmire v. DeBardelaben.

Bill in Equity to open and re-state Final Settlement of Guardian's Accounts.

1. *Equitable relief against probate decree.*—When a party invokes the statutory jurisdiction of the Chancery Court, for the correction of errors of law or fact in a settlement had in the Probate Court (Code, §§ 3837-39), he must affirmatively show that he was free from fault or neglect; and he can not have relief against the settlement, on account of matters which were cognizable in the Probate Court, on a mere general averment of ignorance, or an averment of ignorance coupled with an admission of knowledge of facts sufficient to put him on inquiry.

2. *Dismissal of bill on demurrer, in vacation.*—When a bill is dismissed on demurrer, in vacation, the complainant should be allowed an opportunity to amend it; and the failure to allow him such opportunity will work a reversal of the decree on error.

APPEAL from the Chancery Court of Autauga.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 2d June, 1882, by Jefferson D. Stoudenmire, against his late guardian, Warren L. DeBardelaben; and sought to open a final settlement of the guardian's accounts, which had been made in the Probate Court of said county, on the 9th May, 1881, and to have the accounts re-stated and settled. The complainant's estate consisted principally of a plantation in said county, which he inherited from his father, and which contained about seven hundred acres, the greater portion being open and tillable land. Letters of guardianship were granted to said DeBardelaben, jointly with the complainant's mother, whom he had married, in December, 1871. The complainant attained his majority on the 9th April, 1882, but his disabilities on account of infancy were removed by a decree of the Chancery Court, rendered in May, 1879, prior to the settlement. The allegations of the bill, on which the prayer for relief was founded, were in these words:

"Complainant avers that said DeBardelaben, on qualifying as guardian as aforesaid, took possession of complainant's said plantation, used and occupied it, farmed on it, and rented it out for his own account, up to the date of said final settlement; that the value of the use and occupation of said place, including the rents of such parts thereof as were rented out by said DeBardelaben, was and is worth the sum of \$700, or other large sum of money, *per annum*, but said DeBardelaben has only accounted, in his said guardian's accounts, for about the sum of

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\$105 *per annum* as the rent of the same. The said DeBardelaben pretends that he, as guardian, rented said place to himself individually, and that the rents reported by him were the highest and best rents that could be obtained; but complainant avers that said guardian had no right to rent said lands to himself, and that the said rentings are voidable at his election; and he here now elects to avoid them. Complainant avers, also, that said rentings were not *bona fide*, in this: that said guardian, in offering said lands for rent, required, as a condition of the lease, that the renter should make improvements of an expensive kind; which condition deterred other persons from bidding, and enabled the said guardian to get the said lands at the said nominal sum of about \$105; and that said offerings of said place were so made with the purpose aforesaid of obtaining said lands at a nominal rent; and that the improvements stipulated to be erected by other persons, should they become renters, were not erected by the said guardian when he became the renter. Complainant further avers, that said DeBardelaben, while acting as guardian as aforesaid, committed waste upon complainant's said place, in this: that he tore down and removed therefrom, to his own land, a valuable gin-house, of the value of (to-wit) \$500; and that he has omitted, in his accounts as guardian, to charge himself with the said sum of \$500, or with any other sum, as the value of the house so removed. Complainant avers that the matters and things in this paragraph [alleged] were unknown to him at the time of said final settlement; and that mistakes and errors, to his prejudice, have occurred in the settlement of said guardian's accounts, without any fault or neglect on his part; and that said errors consist in the fact, that said guardian did not charge himself, as he should have done, with the value of the said gin-house, and that he charged himself with only the nominal sum for which he rented said place to himself individually; whereas complainant should have the election to charge him with the value of the use and occupation of said place annually, which he avers was more than five times greater than the rents with which said guardian charged himself."

The chancellor sustained a demurrer to the bill, and dismissed it on motion for want of equity; and his decree, which was rendered at chambers, in vacation, is now assigned as error.

GUNTER & BLAKEY, for the appellant.—(1.) The allegations of the bill show a clear case for equitable relief against the settlement.—*Mock v. Steele*, 34 Ala. 200; *Beaumont v. Boulthbee*, 5 Vesey, 492; *Freeman on Judgments*, § 114. (2.) The decree must be reversed, because no opportunity to amend was given to the complainant.—*Little v. Snedecor*, 52 Ala. 167.

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BRICKELL, C. J.—1. We concur in the opinion of the chancellor, that the bill does not disclose a case in which a court of equity has jurisdiction to open a settlement of a guardian's accounts had in the Court of Probate. The jurisdiction conferred on the court by the statute, to intervene for the correction of errors of law or fact in such settlements (Code of 1876, §§ 3837-39), can not be invoked by any other party than one who is free from fault or neglect. The errors complained of must not have supervened in consequence of any want of reasonable diligence in the party complaining.—*Otis v. Dargan*, 53 Ala. 178; *Waring v. Lewis*, *Ib.* 615; *Boswell v. Townsend*, 57 Ala. 308; *Bowden v. Perdue*, 59 Ala. 409. The matters complained of in the original bill, were all cognizable by the Court of Probate, on the final settlement of the guardianship in that court, and are necessarily involved in the decree then pronounced. The only excuse now averred for not presenting them to the court for consideration, and obtaining the relief now sought, is the averment of the ignorance of the complainant,—an ignorance superinduced, not by any positive misrepresentation of the guardian, but by his failure to charge himself as he ought to have done in his accounts rendered on the settlement. It is not by a mere general averment of ignorance, nor by an averment of ignorance though the party had knowledge of facts that ought to have put him on inquiry, that the imputation of negligence can be repelled.—*Martin v. Br. Bank Decatur*, 31 Ala. 111; *James v. James*, 55 Ala. 525. The complainant knew the sums with which the guardian charged himself for rents. If these were, as is now averred, so disproportionate to the real value of the rents, he was at once put on inquiry as to the conduct of the guardian in renting the lands; and inquiry would doubtless have led him to knowledge of all the facts upon which he now bases a claim for relief. The judgments or decrees of a court of competent jurisdiction are of too much value, to be set aside at the instance of a party who has not been diligent in the assertion of the rights he may have involved in them.

2. But, in rendering in vacation a decree dismissing the bill, not affording the complainant the opportunity of amendment, the chancellor erred, and the error compels a reversal of the decree.—*Kingsbury v. Milner*, 69 Ala. 502.

Reversed and remanded.

[Junkins v. Lovelace.]

72	303
136	639

Junkins v. Lovelace.

Bill in Equity for Specific Performance of Contract; also, for Redemption and Account under Mortgage.

1. *Multifariousness; election.*—A bill which seeks a redemption and account under a mortgage executed by the complainant's deceased brother to the defendants, the complainant claiming as a junior mortgagee; and also a redemption and account under a mortgage on another tract of land, executed by the complainant himself to the defendants, and the specific execution of an agreement by which, as alleged, the defendants redeemed the latter tract of land from a purchaser at execution sale, for the benefit of the complainant, and were to allow him to redeem from them on repayment of the amount advanced, with interest, and the balance due on the mortgage debt, is multifarious; but, a demurrer being sustained to the bill on that ground, the court "approves the practice of putting the complainant to his election."

2. *Foreclosure of mortgage; title of purchaser at register's sale.*—The title of the mortgagor or his heirs is not divested by a sale and conveyance by the register, purporting to have been made under a decree in a foreclosure suit, unless he or they were made defendants to the bill, and a decree of sale was rendered while they were before the court; and the purchaser at the register's sale, to make out his title as against the mortgagor or his heirs, must show these facts.

3. *Competency of party to testify as to transactions with deceased person.* Under a bill to foreclose a mortgage, the mortgagee can not testify as to any transactions between himself and the deceased mortgagor.

4. *Sale of mortgaged lands under execution.*—When mortgaged lands are sold under execution against the mortgagor (Code, § 3209), the purchaser acquires the entire interest of the mortgagor, except his statutory right of redemption; and if this right is not exercised within the two years allowed by law, and the mortgagee then obtains a conveyance from the purchaser, the entire title, legal and equitable, is united and vested in him.

5. *Agreement by mortgagee to redeem from purchaser, for mortgagor.* An agreement or promise by the mortgagee to redeem the lands from a purchaser at execution sale, for the benefit of the mortgagor, and to allow him to redeem on repayment of the amount advanced, with interest, and the balance due on the mortgage debt, is within the statute of frauds (Code, § 2121), and can not be enforced unless a compliance with the requisitions of the statute is shown; and the re-payment of the money does not take the case out of the statute, unless possession was also taken and held under the contract.

6. *Correspondence of pleadings and evidence.*—Evidence alone, without corresponding allegations in the bill, does not entitle the complainant to any relief.

APPEAL from the Chancery Court of Perry.

Heard before the Hon. THOMAS COBBS.

The bill in this case was filed, at what time the record does not show, by George Junkins, against Jesse B. and Charles W.

[Junkins v. Lovelace.]

Lovelace, as partners doing business under the firm name of J. B. & C. W. Lovelace, who were the successors in business of Crenshaw, Lovelace & Co.; and sought, 1st, a redemption and account under a mortgage executed to said partnership by the complainant's deceased brother, James Junkins, on a tract of land which he had also mortgaged to the complainant, who claimed the right to redeem as a junior mortgagee; 2d, a redemption and account under a mortgage on another tract of land, which the complainant himself had executed to said partnership; and, 3d, the specific execution of a parol contract, under and pursuant to which, as alleged, the defendants redeemed the latter tract of land from James E. Webb and Henry Beck (who had become the purchasers at sheriff's sale under execution against the complainant), for the benefit of the complainant, agreeing to hold the land for him, and to allow him to redeem on the re-payment of the amount so advanced by them, with interest, in addition to the amount due on the mortgage debt.

The mortgage given to the defendants by James Junkins was dated January 9th, 1874; recited an indebtedness of \$537.22, balance due for advances made to him by the mortgagees during the year 1873, and the further sum of \$350, advances made and to be made during the year 1874; and conveyed a tract of land containing about one hundred and eighty acres, with mules, crops, &c. The complainant's mortgage on this tract of land was executed several years before, but he had waived his right of priority in favor of the defendants, by writing under seal, in order to enable his brother, the mortgagor, to obtain from the defendants the supplies and advances for which their mortgage was given; and he claimed the right to redeem as a junior mortgagee. He also claimed to have purchased the interest of said James Junkins in said tract of land, at a sale made by the register in chancery of Greene county; the allegations of the bill as to this sale being in these words: "To satisfy said indebtedness of said James Junkins to your orator, and under said mortgage made by him to your orator, and in virtue of a decree of the Chancery Court of Greene county, the said land was sold, and your orator became the purchaser of said land, mules and horses; and by a decree of said Chancery Court, made on the 27th day of November, 1874, the register of said court was ordered to make a deed of conveyance to your orator, conveying to him the title to said land; and on the 22d day of January, 1880, in pursuance of said decree, said register made to your orator a deed, which was duly recorded," &c. The deed was produced, and was included in the register's note of the complainant's evidence, its date and recitals corresponding with the above allegations; but the record and proceedings in the chancery cause, referred to

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in the deed, were not proved. James Junkins died in May, or June, 1874; and the bill alleged that the defendants took possession, under the mortgage, of the land and personal property, sold the crops, &c.; and the complainant claimed that the proceeds of the sales, with the rents of the lands which they had received, and with which they were chargeable, as to which he asked a discovery and account, had more than satisfied the amount due on their mortgage debt.

The mortgage given by the complainant to said defendants was dated January 12th, 1874; recited an indebtedness for advances made during the year 1873, and to be made during the year 1874, aggregating \$1,606; and conveyed a tract of land containing about two hundred acres, with mules and horses, and the crops to be grown. The debt not being paid by the crops raised, there was an extension of credit for another year, and additional advances made, for which a new mortgage on the crops and personal property was taken; and there were subsequent transactions and accountings between the parties. In March, 1875, two judgments were recovered in the Circuit Court of Perry county against the complainant, one in favor of James E. Webb, and the other in favor of Henry Beck; and executions issued on these judgments having been levied on the lands conveyed by the mortgage to the defendants, the lands were sold under these levies on the 7th day of February, 1876, Webb and Beck becoming the purchasers, at the price of \$575, and receiving a conveyance from the sheriff. In March, 1876, Webb and Beck filed a bill in said Chancery Court of Perry, against George Junkins and the Lovelace brothers; asking to be let in to redeem the mortgaged lands, and to have an account stated of the mortgage debt and transactions between the defendants; charging usury, and claiming the rents which accrued after their purchase. The case was brought to this court on appeal, and may be found reported in 62 Ala. 271-84.

In January, 1879, after the determination of that cause, and after the expiration of more than two years from the date of their purchase at sheriff's sale. Webb and Beck sold and conveyed their interest in the lands, by quit-claim deed, to the Lovelaces, on the recited consideration of \$925 in hand paid. In reference to this sale and conveyance, the bill contained this allegation: "Some time during the year 1879, the said J. B. and C. W. Lovelace, at the request of your orator, and for and on his behalf, redeemed said land from said Webb and Beck, under an agreement with your orator that he should have the said land on the payment by him of the amount of his indebtedness to them, and the reasonable and proper amount paid by them for said redemption." The bill further alleged that,

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under this agreement, the complainant had delivered cotton to the defendants to be applied on his indebtedness, and had made payments, which, with the rents properly chargeable against the defendants, was more than sufficient to pay his entire indebtedness to them, with the amount paid by them to Webb and Beck; and he asked that an account might be stated as to all these matters, offering to pay any balance that might be found against him, and that the defendants might be required to re-convey the lands to him, free and discharged from the incumbrance of the mortgage. The defendants, in their answer, denied that they had redeemed the land from Webb and Beck under the agreement alleged in the bill, or under any other agreement made with the complainant; and asserted that they bought the land for their own benefit, without consultation with the complainant, and without his consent or knowledge.

There was a demurrer to the bill for multifariousness, and a motion to dismiss for want of equity, neither of which was acted on by the chancellor, who dismissed the bill, on final hearing on pleadings and proof, because the complainant had failed to make out a case entitling him to relief. The complainant appeals, and assigns the chancellor's decree as error.

W. B. MODAWELL, for appellant.—(1.) The complainant was entitled to relief as to the James Junkins land, although his mortgage may not have been properly foreclosed. If the proof fails to establish his purchase at the foreclosure sale, he is still entitled to redeem as a junior mortgagee.—*Downs v. Hopkins*, 65 Ala. 308. (2.) In equity, until a mortgage is foreclosed, it is regarded as a mere security for a debt. Hence, in this case, as to the lands mortgaged by the complainant himself, the Lovelaces are trustees of the rents and profits, and are bound to apply them to the discharge of the mortgage debt, and of the amount advanced to Webb and Beck.—*Toomer v. Randolph*, 60 Ala. 356; *Davis v. Lassiter*, 20 Ala. 561. (3.) Being trustees, they were incapable of purchasing and holding any interest as against complainant.—*Grigg v. Banks*, 59 Ala. 315; *Toomer v. Randolph*, 60 Ala. 360; Jones on Mortgages, § 1877; 2 Perry on Trusts, § 602; 2 Spence's Eq. Jur. 299–302, 657, 943; *Villa v. Rodriguez*, 12 Wallace, 339. (4.) The purchaser of the equity of redemption buys only the excess or value above the mortgage; and if the mortgagor pays off the secured debt, equity will compel an assignment of the mortgage to him for his reimbursement.—*Annin v. Tice*, 2 Johns. Ch. 125; *Vanderkamp v. Shelton*, 11 Paige, 28; *Lovelace v. Webb*, 62 Ala. 271. (5.) A court of equity will not allow the mortgagee to obtain the equity of redemption for less than its value.—*Goodman v. Pledger*, 14 Ala. 118. (6.) The purchase of the equity

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of redemption by the mortgagee does not extinguish the right to redeem.—*Cullum v. Emanuel*, 1 Ala. 23; *Villa v. Rodriguez*, 12 Wall. 339; *Slee v. Manhattan*, 1 Paige, 48. (7.) The purchase by the defendants from Webb and Beck only removed the incumbrance on the land, and gave them the right to demand compensation for the money thus expended.—*Grigg v. Banks*, 59 Ala. 311.

WM. M. BROOKS, *contra*.—(1.) The bill was multifarious. If the alleged contract to redeem from Webb and Beck, and to hold the land for the benefit of the complainant until he repaid the money so advanced, in addition to the amount due on his mortgage debt, so complicated the accounts that a bill to enforce that agreement authorized and required a redemption and account of his mortgage, no connection whatever existed between those matters and the James Junkins mortgage, nor is any reason shown for uniting them. (2.) As to the James Junkins land, the complainant shows no right to any relief. The evidence adduced by him as to his mortgage and indebtedness from James Junkins, if it does not raise the presumption that the debt was settled and discharged during the life of James, falls far short of the measure of proof required in a suit for foreclosure; and the pretense of a purchase under a decree of foreclosure, supported only by a deed from the register, without any proof of a decree of sale rendered on regular proceedings in a foreclosure suit, utterly fails on the evidence.—16 Wendell, 563; 12 Wendell, 74; 2 Johns. 280; 7 Johns. 535; 12 Johns. 213; 1 Cowen, 622; 5 S. & R. 332; 8 Moore, 46; Story's Eq. Pl. § 354; 9 Ala. 335; 15 Ala. 242; 3 Stew. 54; 60 Ala. 509. (3.) The alleged agreement as to the purchase from Webb and Beck for the complainant's benefit, is explicitly denied in the answers, and there is no evidence in proof of it. If the agreement had been fully proved as alleged, it would not have entitled the complainant to any relief, being void under the statute of frauds, and without any legal consideration. Code, §§ 2121, 2199; 4 Porter, 297; 8 Ala. 948; 1 Johns. Ch. 281; *Patton v. Beecher*, 62 Ala. 579.

STONE, J.—This bill is filed in rather a mixed aspect, partaking somewhat of the nature of a bill for specific performance, and somewhat of the nature of a bill to redeem. It seeks relief as to two distinct subjects-matter, between which it shows no connection whatever. As to one of the subjects, the two Lovelaces are the only necessary defendants. As to the other, in the present state of the proof, if not of the pleadings, the heirs and devisees of James Junkins were necessary parties. The demurrer for multifariousness should have been sustained.

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Story's Eq. Pl. § 271; 1 Brick. Dig. 719-20, §§ 1158, 1170. But, if the demurrer for this ground had been sustained in the court below, we approve the practice of putting the complainant to his election.—*Marriott v. Givens*, 8 Ala. 694; Code of 1876, § 3790.

One phase of the relief prayed relates to the land mortgaged by James Junkins to the appellees, Lovelaces. James Junkins had made a prior mortgage of the same land to George Junkins, but the latter had given his written consent that the Lovelace mortgage should have a prior lien over his. It is claimed that some six hundred dollars, besides interest, still remains due on the mortgage to George Junkins, and that the Lovelaces, from the rents and profits of the mortgaged premises, which they have had since 1874, have been fully paid all that was due them, as secured by the mortgage of James Junkins. As part and parcel of the right to redeem this land, it is averred that, under a decree of the Chancery Court of Greene county, title of the James Junkins land had been made by the register to George Junkins; thus vesting in George all the rights of James Junkins, subject to the mortgage claim of the Lovelaces.

To authorize the register to sell and convey the lands of James Junkins, there must have been a regular foreclosure suit by George Junkins, making James Junkins a party defendant, if in life; and making his heirs defendants, if after his death; and there must have been a decree of sale, when there were proper parties before the court. Less than this could not divest the title of James Junkins, or his heirs, as the case may be; and, consequently, could not clothe George Junkins with the title of James. The averments of the bill do not sufficiently set forth these proceedings; and the proof is, if any difference, more faulty than the averments. This feature of the case, then, must be disposed of, as if no attempt had been averred or shown, having for its object a foreclosure of the mortgage to George Junkins. It results that, in the most favorable light to George in which we can view this question, he comes simply as a mortgagee, to foreclose the mortgage of James Junkins, and to redeem from the Lovelaces. Thus viewed, the bill is fatally defective, in that it does not make the representative and heirs or devisees of James parties defendant; and if they were made parties, there would then be an entire absence of legal proof that there is any thing due on the mortgage. George Junkins, the only witness whose testimony tends to prove such indebtedness, would be rendered incompetent to testify to any transaction with James, his deceased brother; and the testimony of Beck tends to show nothing was due on the two notes described in the mortgage, unless a third note, possibly given in settlement, should be produced, or oth-

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erwise proven. The testimony of Beck opens the door for such testimony. The appellant is entitled to no relief on this phase of the bill.

The other phase of this suit grows out of mortgages made by George Junkins to the Lovelaces, conveying another tract of land, known as the George Junkins tract, to secure the payment of George Junkins's debt. When the mortgage was made, in the early part of 1874, the debt secured by it was a balance for previous advances of \$1,460, and it also secured advances to be made that year. In January, 1876, the balance due for previous advances was \$1,168, and a mortgage was made to secure advances to be made that year. In 1875, Webb and Beck severally recovered judgments against George Junkins, the two amounting to some \$500. Under executions issued on these judgments, the said mortgaged lands of George Junkins were sold by the sheriff in the early part of the year 1876, and Webb and Beck became the purchasers of the equity of redemption, for about the amount of their judgments. When this purchase was made, and the sheriff conveyed to Webb and Beck, Junkins ceased to have any interest in the lands, and ceased to have any right in relation thereto, except the mere statutory right to redeem within two years, from the execution purchasers. If he had exercised this statutory right, and had redeemed from Webb and Beck, he would then have been restored to his former ownership of the equity of redemption, and the relation of mortgagor and mortgagee between him and the Lovelaces would have been re-established. He failed to redeem, and hence lost the title to his lands. In 1879, the Lovelaces, for a valuable consideration paid, received from Webb and Beck a conveyance of all the interest they had in the said George Junkins tract of land, and thus united in themselves the mortgage interest and the equity of redemption, being, at law, a complete title.—*Br. Bank v. Hunt*, 8 Ala. 876; *Lovelace v. Webb*, 62 Ala. 271.

The allegations of the bill, on which a recovery of the George Junkins land is sought, are, that the Lovelaces *redeemed* the land from Webb and Beck, for the said George Junkins, and were to hold them for him, and convey to him, when he paid up the redemption money, and the balance of the mortgage debt. The bill then avers that these sums have been paid to the Lovelaces, and offers to pay any balance, if not paid in full. The answers deny that the lands were redeemed from Junkins, and deny the making of any contract or agreement, by which they obtained the title from Webb and Beck for the benefit of Junkins, and deny that they agreed to convey to Junkins when he paid the purchase-money and the balance of the mortgage indebtedness. All the testimony offered in support of the alleged agreement to redeem, and to reconvey to Junkins when

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he paid up, is the deposition of Junkins himself. If such agreement was made, it was oral, and the bill contains no averments to take it out of the statute of frauds. It is neither averred nor proved that Junkins, after the sheriff's sale, or after the alleged redemption, had possession of the lands. Hence, if he made payments, there is not enough to show the case was taken out of the statute of frauds.—Code of 1876, § 2121, sub. 5; *Patton v. Beecher*, 62 Ala. 579. There are some implications from the testimony, that he did have a possession or control of the land, or a part of it, but that it was as tenant under the receiver. There are no averments, however, to give this any force.

A complete answer to any claim of relief, based on the alleged agreement to redeem, is that the proof does not sustain it. We find, as fact, that this averment is not proved; and hence there is a failure to establish even an oral agreement by the Lovelaces to redeem the land from Webb and Beck, and hold it to be redeemed by Junkins. It is thus shown that, under the averments of this bill, the complainant is entitled to no relief as to the lands formerly owned by him. If there is any proof, tending to show a right to relief on any other ground, it is variant from the allegations of the bill, and it must be denied on that ground.—1 Brick. Dig. 743, §§ 1538-9. We have not scrutinized the accounts narrowly, and can not safely say there is or is not such proof.

It is contended for appellant, that after the sale by the sheriff of the equity of redemption to Webb and Beck, Junkins, the mortgagor, made payments on the mortgage debt, thus reducing the incumbrance created thereby; and inasmuch as such payments do not enure to the benefit of the purchaser of the equity of redemption, and could not have relieved Webb and Beck from any part of the mortgage incumbrance which rested on the land when they purchased, the Lovelaces, by their purchase, acquired no greater rights than Webb and Beck had owned, and passed under the same liabilities which had rested on their vendors. On this principle it is urged, that Junkins, to the extent he has so reduced the mortgage incumbrance, should be subrogated to the rights of the mortgagees.—*Tice v. Annin*, 2 Johns. Ch. 128. There are no averments in the bill which raise this question, and no relief can be granted, even if it be shown in the testimony. As we have said, we have not scrutinized the accounts in reference to it; but we will so far modify the decree as to make it a dismissal without prejudice.

Thus amended, the decree of the chancellor is affirmed.

[Jones v. Drewry.]

Jones v. Drewry.*Bill in Equity by Foreign Creditors, against Devisees and Resident Executor of Deceased Debtor.*

1. *Statute of non-claim; foreign debts.*—The statute of non-claim enacted in 1815, which continued in force until the adoption of the Code of 1852, expressly excepted from its operation “debts contracted out of this State” (Clay’s Digest, 195, § 17); but this exception being entirely omitted from the present statute (Code, §§ 2597–8), the courts have no power to incorporate it.

2. *Administration of assets of deceased debtor; governed by what law.* As against creditors, seeking to enforce satisfaction of their claims out of the assets of their deceased debtor, the administration of the assets is governed by the law of the place where the personal representative acts, and where he was appointed, without regard to the domicile of the creditor, or of the debtor at the time of his death.

3. *Conclusiveness of judgment or decree.*—A judgment and decree rendered in an administration suit in Virginia, where the deceased debtor died, however conclusive against the widow, heirs and devisees, who were parties to the suit, as to the validity and justness of the claims of creditors which were presented and allowed, can not prevent the operation of the Alabama statute of non-claim, when pleaded by them and the personal representative appointed here, in bar of a suit here instituted to enforce satisfaction of the claims out of lands in Alabama.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. H. ARSTILL.

The bill in this case was filed on 14th May, 1878, by James Drewry and others, citizens of Virginia, “in behalf of themselves and all other creditors of James W. Cook, deceased, who are entitled to share in the proceeds of the property of said deceased, sought by this bill to be subjected to sale, and who may come in under the order or decree of the court on such terms as may be prescribed as equitable;” against the widow and children of said decedent, as his heirs at law and devisees under his will, and against Samuel G. Jones as executor, acting under the grant of letters testamentary issued to him by the Probate Court of Lowndes county, Alabama; and sought to enforce satisfaction of the debts due to the complainants respectively, from the said decedent, out of certain lands situated in Montgomery and Lowndes counties, Alabama, which belonged to the decedent at the time of his death, and which were in the possession of the defendants claiming under his will. James W. Cook, the deceased debtor, was a resident and citizen of Virginia at the time of his death; and he there died

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during the year 1864, possessed of a large estate in Virginia, and of two large plantations in Alabama, situated in the counties of Lowndes and Montgomery, with slaves and other personal property. His last will and testament, duly executed according to the laws of Virginia and Alabama, was duly proved and admitted to probate in each of these States. By the terms of the will, three persons were nominated as executors in Virginia, of whom one only, N. P. Young, qualified; and two other persons were nominated as executors in Alabama, both of whom duly qualified, and acted together for a short time, until one of them (Thomas E. Branscombe) resigned, and made a final settlement of his accounts, leaving Samuel G. Jones as the sole acting executor in Alabama. The will directed that the plantations in each State should be kept up and managed by the executors there appointed; that the executors in Alabama should make annual returns to the executors in Virginia, of the profits accruing from the plantations in Alabama; and that all the executors, acting jointly, should allot and set apart to each child, on attaining majority, a proportionate share of the lands and other property.

The bill contained the following allegations: "The said J. W. Cook, at the time of his death, owed a large number of debts in Virginia, which are still unpaid, and amongst others was largely indebted to each of your orators, whose several debts are still unpaid. In the year 1866, the said executor who qualified in Virginia, finding that he was unable to execute the will, filed his original bill in equity in the Circuit Court of Greeneville county, Virginia, for the construction of said will, and the administration of said estate, against the widow, devisees and heirs at law of said Cook; and also against certain creditors of said Cook, who had liens upon a portion of the assets of said estate; and thereupon said court, sitting in equity, took upon itself the administration and settlement of said estate, and, in the exercise of its jurisdiction, audited, allowed, and adjudged many debts to be due and payable out of the real and personal property of said estate,—which judgments are unreversed, and of full force and effect; and a list of said debts so audited and allowed, including those due to your orators, showing the interest and payments thereon up to 1st January, 1874, is hereto attached as a part hereof, marked *Exhibit B*. Upon all of said debts there is a large balance still due and unpaid, and the property of said estate in the State of Virginia is insufficient to pay the said debts there so audited and allowed; and said estate is insolvent, and unable to pay the debts against the same. In said cause in said Circuit Court in Virginia, the several adult defendants were either personally served with process giving notice of said cause, or appeared in

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said cause; and all of the infant defendants were made parties according to the law of Virginia, and appeared, and defended said cause under the direction of said court. Your orators further allege and show, that there are no debts of said estate in Alabama unpaid; that the property of said estate in Alabama consists of two large plantations," particularly describing the lands; "that the assets of said estate in the hands of Samuel G. Jones, other than lands, are of small value and amount; and that it is necessary to sell the said lands for the payment of the debts of said estate, including the debts due to your orators." It was alleged, also, that said Jones, the Alabama executor, "has taken no steps to have said lands sold;" and the Virginia executor was made a defendant to the bill, under an allegation that he refused to join as a complainant. The bill prayed, "that all the property of said estate in Alabama may be sold; that the said Samuel G. Jones make a full settlement of his executorship, and that all of the creditors of said estate be paid *pro rata* out of the funds of said estate under the direction of the court; or that, after paying any and all debts and liabilities of said estate in the State of Alabama, the surplus be transmitted to the executor of said estate in Virginia, to be there administered under the direction of said Circuit Court of Greenville, or otherwise according to law;" and for other and further relief, under the general prayer.

Separate answers were filed by the executor, the widow, the adult heirs, and the guardian *ad litem* of the infant heirs, setting up the statute of non-claim and the statute of limitations by way of pleas; and they also demurred to the bill, because (with other grounds specially assigned) it did not allege or show that the complainants' claims had been presented to the executor in Alabama within eighteen months after the grant of letters testamentary, as required by the statute of non-claim. The chancellor overruled the demurrers and the plea, and held the complainants entitled to relief as prayed; and his decree is now assigned as error by the defendants, jointly and severally.

THOS. G. JONES, for the appellants, relied on the statute of non-claim (Code, § 2597), and contended that foreign debts were not excepted from its operation.

W. A. GUNTER, *contra*.—(1.) The heirs and devisees, being personally liable to the extent of assets descended or devised, might be sued in one jurisdiction, though the assets were in another.—2 Wms. Ex'rs, 1531; *Spackman v. Timbrell*, 8 Sim. 253. Therefore, the litigation with the heirs or devisees in one jurisdiction, and the establishment of the debts by judgment against them there, preclude them from setting up any defense

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going behind the judgment, when sued on it in another jurisdiction.—*Richardson v. Horton*, 7 Beavan, 123; 1 Mac. & G. 449. (2.) By express constitutional provision (Art. iv, § 1), a judgment rendered in one State has equal validity and efficacy in every other State.—U. S. Rev. Stat. § 905. (3.) A general creditors' suit, or an administration suit in which creditors are required to come in and prove their debts, is regarded as a separate suit by each creditor who so comes in, and debts allowed stand as judgments.—*Sterndale v. Hankinson*, 1 Sim. 393; *Pearson v. Darrington*, 32 Ala. 275; *Steele v. Steele*, 64 Ala. 452; 2 Dan. Ch. Pr. 1211, 4th Amer. ed. After decree in such administration suit, which is regarded as in the nature of a judgment for each creditor, creditors will be enjoined from proceeding at law against the debtor's estate. 2 Dan. Ch. Pr. 1615, same edition, and authorities there cited. (4.) The heirs and devisees being concluded by the decree rendered in Virginia, the executor in Alabama should not be allowed to set up, for their benefit, any defense which they are estopped from asserting. The only object of the suit is to subject the lands in Alabama to the payment of the testator's debts, and the executor has no interest whatever in them except for the payment of debts. Where there are executors residing and appointed in different jurisdictions, unlike administrators, a judgment against one is equally conclusive on the others.—*Hill v. Tucker*, 13 Howard, 462; *Goodall v. Tucker*, 13 Howard, 469. (5.) The statute of non-claim does not apply to foreign debts. The express exception contained in the former statute was construed to be unnecessary (*Suydam v. Broadnax*, 14 Peters, 74), and was for that reason, doubtless, omitted from the present statute.

BRICKELL, C. J.—The original statute of non-claim, enacted in 1815, and continuing of force until the adoption of the Code of 1852, contained an exception in favor of "debts contracted out of this State," and of the claims of *femmes covert*. Clay's Dig. 195, § 17. In the revision of the statutes of the Code of 1852, these exceptions were omitted, and the only persons excepted from the operation of the bar of the statute were "heirs or legatees claiming as such," and minors or persons of unsound mind, who were allowed eighteen months after the removal of their respective disabilities for the presentment of their claims.—Code of 1876, §§ 2597–8. The words of the statute are clear, unambiguous, and comprehensive. "All claims against the estate of a deceased person must be presented within eighteen months after the same have accrued, or within eighteen months after the grant of letters testa-

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mentary, or of administration; and if not presented within that time, are forever barred."

The construction of the statute has been in harmony with the undoubted significance of its words. Every claim, or demand, existing against the testator or intestate at the time of his death, or subsequently accruing—every legal liability of either character, to which the personal representative can be made to answer, in courts of law or of equity, or which can charge the assets in his hands subject to administration—is regarded as falling within the operation and bar of the statute. *Fretwell v. McLemore*, 52 Ala. 124; *McDowell v. Jones*, 58 Ala. 25. It is the policy of the whole statutory system touching the administration of estates, that they shall be as speedily as practicable settled and distributed. The creditors have the primary right to be satisfied from the assets. But they have not a right to prolong indefinitely the settlement and distribution of the estate, keeping legatees, or next of kin, or heirs, from the enjoyment of such parts of the estate as the law may appoint them to receive. The debts are but charges, or incumbrances upon the estate; and the same justice and sound policy in which statutes of limitation originate may well be supposed to require, that within a limited time they should be presented to the personal representative, that he may proceed safely in the administration, and the legatees, or next of kin, or heirs, may ascertain the extent of their interest, and that it is free from incumbrances.

The legislature having omitted the exception of "debts contracted out of the State" from the bar of the statute, the courts are powerless again to introduce it. The omission is a clear signification of the legislative will that such debts shall fall within the operation of the statute. Independent of this consideration, the rule is well settled, that general words of a statute must receive a general construction, and unless for restraining them there can be found some ground or reason in the statute itself, they are not to be restrained by arbitrary addition or retrenchment. Upon this rule rests the rule which may be said to be inflexible, that no exception to a statute of limitation can be claimed, if it be not expressly mentioned in the statute. *Howell v. Hair*, 15 Ala. 194; *Harwell v. Steele*, 17 Ala. 372; *Binford v. Binford*, 22 Ala. 682; *Yniestra v. Tarleton*, 67 Ala. 126. Whatever may have been true in 1815, when the statute was originally enacted, and within our territorial jurisdiction there were but few citizens who had not recently migrated from other States; there would be, now, but little of reason or of justice in subjecting creditors whose debts were contracted here to the operation of the statute, and relieving creditors whose debts were contracted elsewhere. The cause

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in which the exception had its origin passed away, and the legislature deemed it proper the exception should also cease. The cause for excepting married women from the statute was the disability, under which they labored at common law, of asserting and enforcing demands to which they were entitled. The disability was removed by legislation, and the exception of their claims from the operation of the statute was abrogated.

The argument of appellees' counsel is addressed to the proposition, that the statute, of itself, is incapable of application to contracts made without the State; that it is a general statute, without a direct application to such contracts, and, not expressly mentioning them, can not be construed to include them. Such, it is said, is the construction placed upon the former statute by the Supreme Court of the United States, in *Suydam v. Broadnax*, 14 Peters, 67. The single question before the court in that case was, whether the judicial ascertainment of the insolvency of an estate, by the Orphan's Court having jurisdiction, could be pleaded in abatement of a suit subsequently commenced by a creditor, a citizen of New York, in the Circuit Court of the United States; the statute in reference to insolvent estates then of force prohibiting the commencement of such suits after the estate had been represented insolvent. There was no question before the court, touching the construction or operation of the statute of non claim; it was not even adverted to in the argument of counsel. The only question which the court decided, or could have decided, was, that a statute of the State, abridging the jurisdiction of its courts, could not be applied to the courts of the United States, however general may be its terms. This is apparent from the certificate ordered to the Circuit Court, which simply was, "that the plea that the estate of the deceased is insolvent is not sufficient in law to abate the plaintiff's action." Whatever may be said in the opinion touching the statute of non-claim and its operation, is mere *dicta*.

The established rule of law, as we understand it, is, that in regard to creditors, the administration of the assets of deceased persons is governed exclusively by the law of the place where the executor or administrator acts, and from which he derives authority. The domicile of the intestate or testator, or of the creditor, can not authorize the introduction of another law, to defeat the law of the *situs* of the administration.—Story's Conf. Laws, § 524. The obligation of contracts, wherever made, and whether made with a citizen of the State or of another State, can not be impaired. The citizen of another State can be denied no right, in enforcing his claims, which is granted to the citizen of the State. There can be, in the order of payment, no discrimination because of citizenship, in favor of the claims of

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the one, and against the other. When the obligation of the contract is not impaired—when the citizens of other States are placed upon an equality of right with our own citizens—the law of the State regulating the administration of the assets of deceased persons must govern, whatever may be the law of the domicile of the testator or intestate, or of creditors.—*Smith v. Union Bank*, 5 Peters, 513; *McElmoyle v. Cohen*, 13 Peters, 312. The statute simply requires, that the creditor shall, within a specified period, do a particular act, to preserve his right to subject the assets to the payment of his demand. The failure to do the act bars the claim from charging or incumbering the assets. There is no greater reason for the exception of debts contracted without the State, from the operation of the statute, than there would be for the exception of such debts from the statutes of limitation. There is no greater reason for reading the statute as limited in operation to debts contracted within the State, or to the debts of our own citizens, wherever they may have been contracted, than there would be for reading the statute of limitations as so confined. Neither statute is directed to the validity or obligation of contracts—each affects only remedies, and goes “*ad litis ordinationem*, and not *ad litis decisionem*, in a just judicial sense.”—Story’s Con. Laws, § 576. There could have been but one purpose in the omission from the statute of “debts contracted out of the State;” and that purpose is, that the general words of the statute embracing them should have full operation.

A judgment of a court of law, or a decree of a court of equity, is conclusive of all the facts actually litigated and decided, and of all facts necessarily involved in the issues of the suit. It may be, that the decrees rendered in Virginia are conclusive, as against the widow and devisees, of the validity and justness of the demands preferred by the appellees; and of the same facts, it may be, they are *prima facie* evidence against the executor resident in this State. The validity, or justness of the debts, is not the question now involved. The question is, whether the creditors have done an act which the statute of this State declares a condition precedent to their right to charge the assets subject to administration in the courts and under the laws of this State. The question was not involved, and could not have been litigated, in the suit in which the decree in Virginia was rendered. The conclusiveness, or the estoppel of judgments or decrees, does not extend to matters which are drawn in question collaterally, or which were incidentally cognizable in the suit in which they were rendered; and it can not be extended to estop parties from litigating matters, from making defenses, of which the court could not have taken cognizance, and which would not have availed them as to the termi-

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nation of that suit, if of them the court had taken cognizance.

The statute requires the creditor to do an act within a specified time, to preserve his claim as a charge or incumbrance upon the estate of a deceased person. If the act be not done, whatever of justice there may be in his claim, however full may be the knowledge of the personal representative, or of heirs, or of legatees, or next of kin, entitled to the secondary right to the estate, of the existence and justice of the claim, the bar of the statute can be avoided only by the presentment to the personal representative,—the act which the statute requires.—*Jones v. Lightfoot*, 10 Ala. 17; *Boggs v. Br. Bank Mobile*, 1b. 970; *Bank v. Hawkins*, 12 Ala. 755; *Pipkin v. Hewlett*, 17 Ala. 291; *McDowell v. Jones*, 58 Ala. 25. The widow and devisees from the suit in Virginia may have derived full knowledge of the existence of the claims of the appellees, and may by the decree rendered in that suit be concluded from disputing their justness. The knowledge they acquired, the estoppel of the decree, can not affect the operation of the statute regulating the administration of assets here situate, and in our courts can not open a controversy the statute intended to bar,—the liability of the assets to be charged with the payment of claims not presented.

Whether the statute operates a bar to the claim, is the only question which was argued by counsel, and we confine our decision to it. In any view which we can take, we are constrained to the conclusion, it is a positive bar, no court obeying the statute can disregard. The result is, the decree of the chancellor must be reversed, and a decree here rendered, dismissing the bill at the cost of the appellees.

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Action on Written Contract for Payment of Cotton, as Rent.

1. *Contracts of infants.*—The modern decisions, including our own adjudged cases, have settled these propositions: 1st, that an infant is not liable on any of his contracts, excepting only for necessities,—the just value of which may be recovered, but not the price agreed to be paid; 2d, that the appointment of an attorney is the only act which an infant is legally incapacitated to perform; 3d, that all other contracts of an infant, whether executed or executory, are only voidable, and may be either ratified or avoided at his election.

2. *Same.*—The plea of infancy is a good defense to an action on a written obligation given for the rent of land, when the action is com-

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menced before the infant has attained his majority, and before the expiration of the term.

3. *Same*.—Such contract, being executory, can only be ratified by “an express confirmation, or new promise, voluntarily and deliberately made by the infant upon his coming of age, and with knowledge that he is not legally liable.” The fact that he retained and sold the crops raised by him is not a ratification or affirmation of the contract.

APPEAL from the Circuit Court of Butler.

Tried before the Hon. JAMES COBB.

This action was brought by appellants, suing as partners, against Thomas Dickerson and Preston Dickerson; was founded on the defendants' written obligation, dated January 5th, 1878, signed “*Tom and Preston Dickerson*,” and in these words: “On the first day of October, 1878, we promise to pay to Sarah Dickerson one bale cotton, 400 lbs., and one hundred and fifty bush. corn, to be delivered in Greenville, or at some save [safe?] house at the plantation, the same being for rent; also, the seed out of the above cotton;” and was commenced by original attachment, sued out on the 16th October, 1878, on the ground that the defendants had removed a portion of the crop from the premises without paying the rent. The plaintiffs sued as the assignees of the writing, and there was a demurrer to the complaint, which the court below sustained; but the judgment was reversed by this court, and the cause remanded.—*Flexner & Lichten v. Dickerson*, 65 Ala. 72. After the remandment of the cause, the defendants filed a special plea, averring that, “at the time of making the contract mentioned in said complaint, they were both infants under the age of twenty-one years;” to which the plaintiffs replied, “that said contract is a contract for rent, such as an infant can legally make, and that said defendants entered upon the rented premises, remained in possession thereof, enjoyed the possession, and never disclaimed being the renters.” The court sustained a demurrer to this replication; “and the plaintiffs then pleaded over,” as the bill of exceptions recites, “in short by consent, 1st, by taking issue on the plea of infancy; 2d, that the defendants had ratified and affirmed the contract, whereupon issue was taken.” The judgment-entry only recites that the cause was tried on issue joined.

On the trial, as the bill of exceptions recites, the plaintiffs offered in evidence the writing sued on, “and introduced evidence tending to show that defendants rented the lands of Mrs. Sarah Dickerson for the year 1878, and gave said note or contract for the rent of said year; that they went into the possession of the rented lands, remained in possession during the entire year, without molestation by any one, and were in possession of the crop raised on the place at the time the cotton and corn was levied on; that they gave a replevy bond for the

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cotton and corn, which was then delivered to them by the sheriff; that they continued in the possession of the place for the years 1879 and 1880 (but under what contract did not appear), controlling the same, selling and disposing of the same as their own; that the cotton levied on was in the possession of Simpson, their surety, after Preston Dickerson attained his majority, which was after the expiration of said term of renting, by and with their consent; and that they took the corn left, and used it on the place. The defendants introduced proof tending to show that each of them was under twenty-one years of age when said note or contract was made, and did not attain the age of twenty-one until after the expiration of said term of renting, and after the expiration of the year 1878. The evidence was uncontradicted, that at the making of said note or contract, and at the time of the commencement of this suit, and during the whole of the rental year (1878), the defendants were under twenty-one years of age; that the contract sued on was for the year 1878 only; and that the defendants commenced to resist and defend this suit, as soon as it was begun, and have continued so to resist and defend."

On this evidence, the court charged the jury, on the request of the defendants, as follows: "If the jury believe, from the evidence, that the contract which is the foundation of the suit was entered into while the defendants were minors under twenty-one years of age, and was a contract of renting for one year only; and that said contract expired by its terms before either of the defendants arrived at the age of twenty-one years; and that this suit was commenced before the expiration of the year for which the land was rented, and before the defendants became of age,—then they will find for the defendants."

The plaintiffs excepted to this charge, and requested several charges in writing, as follows: 1. "If the jury believe that the defendants rented the premises for the year 1878, and entered into the possession thereof, and continued in the possession under their claim by rent, and did not, either by act, word or deed, disclaim before the rent day; then they will find for the plaintiffs, so far as the plea of minority is concerned." 2. "If the jury are satisfied, from the evidence, that the defendants rented the lands for the year 1878, and gave the note or contract in evidence for the rent, and entered upon the possession of the rented premises under said contract, and continued in the possession during the entire term, receiving and enjoying the fruits of the contract, and in no manner disclaimed before the rent day; then they will find for the plaintiffs, so far as the plea of minority is concerned." 3. "If the jury are satisfied, from the evidence, that the defendants entered upon the possession of the land under said contract of renting for the year

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1878, and continued to enjoy the possession during the whole year, without let or hindrance by any one; and that they continued in the possession of the land during the year 1879, without any new contract, holding over (and as there is no proof as to how they held or occupied, it is presumed they held on the terms of the contract of 1878); and if they held over after they attained their majority, under this presumption; then the jury may look to these, together with all other acts and circumstances in the case, to show whether or not the defendants affirmed said contract after they attained their majority; and if they are satisfied, from all the facts and circumstances proved in the case, that the defendants affirmed this contract after they attained their majority, they must find for the plaintiffs." 4. "The infancy of the defendants, at the time of the making of the note or contract read in evidence, is no defense to this action, if the jury find that the lease was beneficial to the defendants, and was not waived by them, either by word or deed, before the rent day." 5. "If the jury are satisfied, looking at all the evidence in the case, that acts and declarations of the defendants proved in the case, reasonably considered, imply an affirmation of the contract by them, then they should find for the plaintiffs, notwithstanding their minority at the time of the execution of the contract." The court refused each of these charges, and the plaintiffs duly excepted to their refusal.

The sustaining of the demurrer to the replication, the charge given, and the refusal of the several charges asked, are now assigned as error.

JNO. GAMBLE, for the appellants.—If a minor take a lease of land, and enter and continue in possession of the claim by rent, he is liable to the same process, and to the same action as an adult, to enforce his contract for rent; and he can only exonerate himself from the obligation to pay rent, by disclaiming before the rent-day comes.—*Railway Co. v. Coombe*, 3 Excheq. 569; *Railway Co. v. McMichael*, 5 Excheq. 126; *Kirten v. Elliott*, 2 Bulst. 69; *Evelyn v. Chichester*, 3 Burr. 1719; Tyler on Infancy, § 122, where these authorities are cited with approbation; 17 Barbour, 149; 6 Wait's Actions and Defenses, 230; 5 *Ib.* 58, 68. Infancy of the lessee, at the time of executing the lease, is no defense to an action for the rent, if the lease is beneficial, and was not waived before rent-day.—4 Wait's A. and D. 272. The contract being voidable only, it might be ratified and affirmed; and the charges asked were intended to present the question of ratification. The refusal of these charges withdrew from the consideration of the jury the evidence relied on as showing a ratification, and was therefore

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erroneous.—*Edgar v. McArn*, 22 Ala. 796; *Pritchett v. Munroe*, 22 Ala. 501; *Reese v. Beck*, 24 Ala. 651; *Upson v. Raiford*, 29 Ala. 188.

J. C. RICHARDSON, *contra*, cited Schouler's Dom. Rel. 539; Ewell's Lead. Cases, 53; 6 Amer. Lead. Cases, 5th ed. 300-02; *Philpot v. Bingham*, 55 Ala. 438; *Freeman v. Bradford*, 5 Porter, 272; 26 Amer. L. & C. 279; 38 Amer. Dec. 623; 4 Wait's Actions and Defenses 20-21; 7 *Ib.* 129.

SOMERVILLE, J.—The following propositions we consider to be settled by the modern decisions in this country, including our own adjudged cases: 1. Infants are not liable on any of their contracts, excepting only for *necessaries*,—the sum to be recovered in such cases being the just *value of the necessities*, and not what was agreed to be paid. 2. The only act which an infant is legally incapacitated to perform, is the *appointment of an attorney*. 3. *All other contracts of infants, whether executory or executed, may be avoided or ratified at the election of the infant, being considered voidable, and not absolutely void.* *Philpot v. Bingham*, 55 Ala. 435; *Manning v. Johnson*, 26 Ala. 446; *Clark v. Goddard*, 39 Ala. 164; 1 Amer. Lead. Cases (5th ed.), 242, 300; Bishop on Contr. §§ 260-266; 2 Greenl. Ev. §§ 364, *et seq.*; 7 Wait's Act. & Def. 131; *Rainwater v. Durham*, 10 Amer. Dec. 637; *Bool v. Mix*, 17 Wend. 119; *Wheaton v. East*, 5 Yerg. 41; Taylor on Land. & Ten. §§ 93, 96; 2 Brick. Dig. 109, §§ 8, *et seq.*

The obligation here sued on was executed by the appellees while they were minors under the age of twenty-one years. It was given for rent of land for the year 1878, being payable to their mother, and was afterwards assigned to plaintiff. Under this state of facts, the plea of infancy was good, and the court did not err in giving the charge requested by the defendants.

The charges requested by the plaintiffs were properly refused. The record contains no evidence tending to prove a ratification by the defendants of the contract of renting, which was for the year 1878 *only*. The action was commenced in October, 1878, by attachment; and from that time, to the date of trial, the defendants are shown to have been active in their effort to disavow their legal liability, and to resist all recovery by the plaintiff.—*Eureka Co. v. Edwards*, 71 Ala. 248; *McCarthy v. Nicosi*, at present term *post*, 332. The fact that the defendants retained and sold the crops which were raised by them on the premises, was no affirmation of their contract to pay rent. The consideration of the agreement sued on was not the crops, but the use of the land. It can not be maintained that

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the appropriation by defendants of the fruits of their labor was such a positive and unequivocal act as to indicate an intention to bind themselves for the rent. Nor is it an act at all inconsistent with the right to repudiate such liability, as would be the sale or conveyance by an infant, after he becomes of age, of the land or personal property itself which he may have purchased, as constituting the *consideration* of the contract. Ratification may be inferred, as often decided, by the infant's continuing to hold and treat ~~the~~ property or thing purchased as his own, or by selling it *after attaining his majority*. Clearly the taking of a new lease for another year, of the same land, after the expiration of the old one, would not come within the influence of this principle.—2 Greenl. Ev. § 367; *Williams v. Mow*, 11 M. & W. 256; *Lawson v. Lovejoy*, 23 Amer. Dec. 526.

The present agreement to pay rent is executory, and having been entered into during infancy, can be ratified only by “an *express confirmation*, or *new promise*, voluntarily and deliberately made by the infant, upon his coming of age, and with knowledge that he is not legally liable.”—2 Greenl. Ev. § 367; Bish. on Contr. § 276; *Thompson v. Lay*, 16 Amer. Dec. 325.

We discover no error in the record, and the judgment is affirmed.

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Action by Guest against Innkeeper, for Money Lost.

1. *Statutes construed with reference to common law.*—All statutes are to be construed with reference to the principles of the common law; and an intention to abrogate or modify it is not to be presumed, further than is expressed, or absolutely required by the case.

2. *Innkeeper's liability; at common law.*—At common law, an innkeeper was bound to receive and entertain, for a reasonable reward, all persons who applied to him, not being of disorderly conduct, and having the means of payment; the principles regulating his rights, duties, and liabilities towards his guests, being founded on considerations of public policy, and intended for the security of travellers and strangers, who were necessarily compelled to intrust their property to him.

3. *Same; statutory regulations as to.*—By statutory provisions forming a part of the general revenue law (Code, §§ 522–25), the keepers of inns and hotels are required to take out an annual license, and their liabilities towards their guests are declared to be, “in the absence of a special contract regulating the same, such as are fixed by the laws of the land;” while the keeper of a “house or place for the entertainment of travellers, lodgers, transient persons or guests, in any town, city or vil-

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lage," from whom no license is required, but on whom an income tax is imposed, is allowed a large liberty in the selection of his guests, and is required to make a special contract with them, evidenced by a memorandum printed or written.

4. *Same*.—If the keeper of such unlicensed house of entertainment fails to make a special contract with his guest, as required by the statute, he can not recover compensation for board and lodging furnished, and assumes the common-law liability of an innkeeper for the loss of goods belonging to his guest; and when sued by a guest for the loss of goods, he can not be heard to say that he was not a licensed innkeeper.

5. *Same; keeping depository for valuables, and posting notice thereof*. The keeper of an inn or public hotel in a city may relieve himself from liability for the loss of money, jewelry, &c., by providing a safe depository for such articles, and giving notice thereof to his guests (Code, §§ 1549-51); but the posting of notice on a single door in the house, no matter how public it may be, is not a sufficient compliance with the statute, and does not justify the inference of notice to any particular guest. This provision, however, is confined to cities, and has no application to houses in a town or village, or in the country.

6. *Same; who is guest*.—A traveller, or transient visitor, engaged on temporary business, does not lose the character of a guest in a hotel, merely because he makes a special contract for board and lodging at less than the usual charges.

7. *Relevancy of evidence as to conduct of servant charged with larceny of guest's money, in action against innkeeper*.—In an action by a guest against an innkeeper, for the loss of money, the conduct, demeanor or appearance of a servant at the hotel, while on trial charged with the larceny, though it might be competent evidence against himself as an implied admission or confession, is not admissible against the defendant, his employer.

8. *To what witness may testify*.—A witness may testify, as a fact, that he "knew and recognized the walk" of another person.

APPEAL from the Circuit Court of Conecuh.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by James W. Posey, against W. G. Beale, as the keeper of a public hotel in the town of Evergreen in said county, called and known as the "Evergreen Hotel," to recover damages for money lost by the plaintiff while a guest at said hotel, in May, 1879, and which was alleged to have been stolen by some one or more of the defendant's servants, or to have been lost by the carelessness or negligence of the defendant or his servants; and was commenced on the 1st April, 1880. The defendant filed two special pleas; the first alleging, "that the said town of Evergreen, at the time of said alleged loss by plaintiff, contained less than twenty-five hundred inhabitants, and defendant did not, at, before, or since said time, have any license as the keeper of an inn or hotel, and was not liable as such for the loss alleged to have been sustained by plaintiff;" and the second, "that at, before, and since the time alleged in the complaint, defendant had an iron safe, for the safe-keeping of valuable articles belonging to his customers, and said plaintiff failed and refused to deposit his said money in said safe, but kept it exclusively in his own custody, and

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kept the same so negligently and carelessly as to contribute to the loss thereof." The court sustained a demurrer to each of these special pleas, and the cause was tried on issue joined on the plea of not guilty.

On the trial, the plaintiff testified as a witness for himself, and stated the facts connected with the loss of his money, while occupying a room at the defendant's hotel in Evergreen, on the night of May 6th, 1879, or early the next morning before he was up; and he adduced evidence tending to show that the money was stolen by one George Richardson, a servant in the hotel, who waited on the plaintiff in his room, brought water, &c. It appeared from the plaintiff's testimony, that the money was in his pocket-book in his pantaloons, which he hung on the bed-post at his head on retiring at night; and that he had not discovered they were missing, until said Richardson asked him, in the morning, before he arose, whether those were his pantaloons in an adjoining unoccupied room; and when they were examined, his pocket-book and money was gone, and some of the papers were scattered about the room. In giving his testimony as to these matters, plaintiff stated, among other things: "I slipped the bolt in the catch on the door, there being no key in the lock, and, pulling the door to see if the bolt was fastened, I found that it was. . . . I slept until morning, and awoke about sun-rise; and very soon afterwards I heard some one walk down the hall. *I recognized the walk to be that of George Richardson. I knew his walk.*" The defendant objected to the admission of the italicized words as evidence, but without stating any particular ground of objection; and he reserved an exception to the overruling of his objection. It appeared that said Richardson was arrested, with other servants about the hotel, on the day after the loss of the money, under a charge of larceny; and a witness for the plaintiff testified: "On the trial, *George was laughing, and seemed to be very lively in the beginning; but, towards the last, he looked sad and downcast.*" To the admission of this statement as evidence the defendant objected, and reserved an exception to the overruling of his objection.

It appeared that the plaintiff had been in the habit of stopping at the defendant's hotel whenever he was in Evergreen, and had attempted "to make arrangements with defendant to count the time when he was there, and let him pay by the month, or somehow that way; but defendant said he could not do that, but would sell him meal tickets, worth fifty cents each, at three for a dollar, and lodging at the same rate;" that plaintiff bought some tickets under this arrangement, and afterwards continued to pay at the same rates, whenever he stopped at the hotel, but without buying any tickets in advance. On

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the part of the defendant it was proved, "that he kept an iron safe in the house for the deposit of money and valuables by persons stopping with him, and that a notice to that effect, in writing, was posted on one of the doors of the parlor, before and at the time of plaintiff's said loss;" also, "that plaintiff did not make any application to deposit anything with him that night, and he did not know plaintiff was in the house until informed of the loss in the morning." It was proved, also, that the defendant had not taken out a license as the keeper of a public hotel, as by law required.

"The foregoing was, in substance, all the evidence introduced on the trial; and the court thereupon charged the jury," among other things, as follows: 1. "That it was the duty of the defendant to hire honest and competent servants; and if he did not, he would be liable, if the plaintiff thereby lost his money, without fault or negligence on his own part." 2. "That the taking out of a license as the keeper of an inn or hotel was not necessary to render the defendant liable; for he would be liable without such license, if his liability had been shown in all other respects."

The court charged the jury, also, on the request of the plaintiff, as follows: 1. "A hotel-keeper, who employs servants to attend to the rooms of his guests, is expected to employ those who are honest; and if he fails to do so, and a loss is thereby occasioned, without negligence on the part of the guest, he is responsible to the guest for such loss." 2. "If the jury believe, from the evidence, that the plaintiff's money was taken or stolen by the defendant's servants, employed by him in the house, or through the negligence of said servants, without negligence on the part of the plaintiff; then the defendant is liable to the plaintiff, if he was at the time the guest of the defendant at his hotel." 3. "If the jury are satisfied, from the evidence, and under the law as given to them by the court, that the defendant was the proprietor and keeper of a hotel or inn; and that plaintiff was a guest at said hotel, and, while at said hotel, had his money stolen from him by the defendant's servant, employed by the proprietor as a waiter in said hotel, without negligence on the part of the plaintiff; then plaintiff is entitled to recover whatever amount the proof satisfies them was so stolen from him, with interest thereon; and the plaintiff is only required in such case, in order to make the hotel-keeper liable, to exercise ordinary care and diligence." 4. "Unless the jury should believe, from the evidence, that the defendant had posted, at the time the money sued for was lost, notices on the doors and other public places in his said house or hotel, containing the terms in the statute, or the material parts thereof, as required by section 1549 of the Code,—then

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the defendant would not be relieved from his liability as hotel-keeper; and even if the jury should believe, from all the evidence together, that the defendant had, at that time, one notice of that character posted on the door of the parlor in the house, and no other place or door therein, this would not be a compliance with the statute, and would not relieve the defendant from liability as such hotel-keeper." "To the giving of each and all of which instructions," the bill of exceptions states, "the defendant then and there excepted;" and he requested the court, in writing, to instruct the jury, "that if they believe, from the evidence, that the defendant did not take out a license as inn-keeper, or hotel-keeper, for the year 1879, then, notwithstanding the fact that he might have kept boarders, and entertained transient persons, he would not be an inn-keeper, or hotel-keeper." The court refused to give this charge, and the defendant excepted to its refusal.

The rulings of the court on the pleadings and evidence, the charges given, and the refusal of the charge asked, are now assigned as error.

G. R. FARNHAM, with TROY & TOMPKINS, for appellants.—1. At common law, an innkeeper was responsible for the loss of goods belonging to his guests, unless caused by the act of God, the public enemy, or the conduct of the guest himself, his servant, or companion.—*Mason v. Thompson*, 9 Pick. 280; *Calye's case*, 8 Co. 32; 1 Smith's L. C. 266; *Chamberlain & Co. v. Masterson*, 26 Ala. 371. The rigor of this rule grew out of the necessities of the times in which it was adopted, and modifications of it have been adopted in more modern times, as suggested in the case of *Chamberlain & Co. v. Masterson*, *supra*. But, if the guest did not trust his goods to the custody of the innkeeper, taking the care and custody exclusively on himself, the innkeeper was discharged from liability.—Story on Bailments, §§ 466, 466 *a*, 468 *a*, 483; Whart. Law Negl. §§ 690-91; 21 N. Y. 111; 1 Denio, 99. And the keeper of a lodging-house did not assume or incur the high responsibility of an innkeeper.—Story on Bailments, § 475 *a*; Whart. Negl. § 681.

2. These rules of the common law have been changed by statute in this State (Code, §§ 522-25); and the manifest purpose of these statutory provisions was to abrogate the rules of the common law, which required an innkeeper to receive as guests all persons who might apply for admission, and to extend equal accommodations to all. The court will take judicial notice of the state of public affairs existing at that time, growing out of political events and attempted legislation in favor of social as well as political equality, and will give effect to the manifest purpose and intention of our law-makers. Un-

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der these statutory provisions, a person might keep a private house of entertainment for boarders or guests, without incurring or assuming the duties or liabilities of the keeper of a public inn or hotel. He might refuse to take out a license, or he might surrender a license already taken out; and in either case, he was not an innkeeper. The taking out of a license was the single fact which determined his character, and fixed his liabilities and duties. If the refusal to take out a license, or the surrender of a license already taken out, does not relieve him of the common-law liability of an innkeeper for the goods of his guest, neither does it relieve him of the common-law duty of receiving as guests all persons who may apply.—*Rex v. Ivens*, 7 Car. & P. 213; Story on Bailments, § 476, 7th edition.

3. The rulings of the court on the evidence must compel a reversal. The statement of the witness as to the appearance of George Richardson, while on trial charged with the larceny, was the mere expression of an opinion, and was not legal evidence.—*Johnson v. The State*, 17 Ala. 618; *Donnell v. Jones*, 13 Ala. 490. If he had been on trial for the offense, the evidence could only have been urged against him as an implied admission, and would not have been competent for that purpose; and even an express admission by him, or confession, would not have been admissible as evidence against his employer.—*Maples v. Railroad Co.*, 63 Ala. 601; *Henry v. Northern Bank*, 63 Ala. 527; *Bynum v. So. Pump Co.*, 63 Ala. 462; 80 Penn. St. 107.

J. W. POSEY, *pro se*, with STALLWORTH & BURNETT, and JNO. GAMBLE, *contra*.—(1.) Under the facts proved, the defendant was the keeper of a public inn or hotel, and the plaintiff was a guest at his house when the loss occurred.—Story on Bailments, §§ 475, 477, 479, 468, 485; 4 Wait's Actions & Defenses, pp. 1-2, §§ 1, 2; Wharton's Law. Negl. §§ 679, 683; 2 Kent's Com. 770-2, 8th ed. (2.) If the defendant was the keeper of a public inn or hotel, his failure to take out a revenue license was a misdemeanor, for which he might have been prosecuted criminally, but did not relieve him from the civil duties and responsibilities which the law attached to his position. To allow it to have this effect, would be to allow him to take advantage of his own wrong. (3.) The defendant's abortive attempt to shield himself from liability, by showing that he had provided an iron safe for the safe custody of valuables, and had given public notice thereof to his guests, must fail on the proof; 1st, because it was not shown that plaintiff had actual notice thereof, and the facts necessary to charge him with constructive notice were not proved; 2d, because the statute applies only to cities, and there was no attempt to show that Evergreen is a city.

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(4.) Evidence tending to show that the money was stolen by one of the defendant's servants at the hotel, was relevant and admissible for the plaintiff; and any evidence which would be competent as against the servant himself, when charged with the larceny, ought also to be admissible against his employer, when sued civilly for the same wrong. (5.) The evidence objected to was not the mere statement of an opinion by the witness, but was a matter of fact open to observation, to which a witness is allowed to testify.—63 Ala. 275; 57 Ala. 566; 50 Ala. 107; 49 Ala. 4; 38 Ala. 703; 37 Ala. 288; 58 Ala. 395; 11 Ala. 737. (6.) The exception to the charges given was only a general exception, and can not prevail if any one of the charges is correct.

BRICKELL, C. J.—The proposition involved in the first special plea, to which a demurrer was sustained, and in the charge requested and refused, to the refusal of which an exception was reserved, is, that as the defendant was not a licensed keeper of an inn or hotel, though he may have kept a house of public entertainment, he was absolved from the common-law liability for the goods of his guests lost *infra hospitium*. This, it is insisted, is the result of the statutory regulations of inns, hotels, and boarding houses, embodied in the Code.—Code of 1876, §§ 522–25.

These sections form part of the general revenue laws of the State; the first requiring every keeper of an inn or hotel to take out a license annually, to be issued by the judge of probate, the sum to be paid for such license being graduated according to the population of the town in which the inn or hotel may be situate. It is declared, “the liabilities of the keepers of such inns, or hotels, and of persons who are guests therein, shall be such as are fixed by the laws of the land, in the absence of a special contract regulating the same, made between the parties thereto.” The next section authorizes the surrender of licenses taken for the keeping of an inn or hotel, and declares that only such persons as are required to take out license, “shall be considered as inn-keepers or hotel-keepers.” The next section authorizes the keeping in any town, city, or village, of a house or place for the entertainment of travellers, lodgers, transient persons, or guests, imposing a tax on the net income derived therefrom. The last section provides, that no person shall have the right to demand board, lodging, or entertainment, from the keeper of any unlicensed house of entertainment, otherwise than by special contract; and the parties to such contract shall be bound by the stipulations thereof lawfully made, and not otherwise. In the absence of such special contract, evidenced by a memorandum in print or in writing, to be fur-

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nished to such guest, boarder, or lodger, by the keeper or manager of such house, compensation is not allowed him.

The obvious purpose of these statutory regulations, so far as not devoted to the derivation of revenue, is to authorize the keeper of a house of entertainment, not licensed, to contract specially with the guests or boarders he may receive and entertain, and when such special contract is made and evidenced in conformity to the statute, that it shall become the measure of the right, liability and duty of each party. By the common law, an imperative duty of an inn-keeper was, to receive and entertain, for a reasonable compensation, all persons applying, not of disorderly conduct, and having the means of payment. There was as little discretion left him in the choice of his guests, as there was to the common carrier in the selection of the persons for whom he would perform his duties. Each is engaged in public employment, bound, in the absence of reasonable grounds for refusal, to serve all having a necessity for their services. The purpose of the statute is, to confer on the keeper of the unlicensed house of public entertainment the liberty of receiving only such guests or boarders as may enter into a special contract with him. But, if the keeper of such house does not enter into a special contract with the guest, furnishing him a memorandum thereof in print or in writing, limiting his liability, the common law intervenes, and from that the measure of his liability must be ascertained.

All statutes are construed in reference to the principles of the common law; and it is not to be presumed that there is an intention to modify, or to abrogate it, further than may be expressed, or than the case may absolutely require.—1 Kent, 464. The keeper of a house of entertainment, holding himself out to the world as the keeper of a public inn, in that capacity inviting public patronage, trust and confidence, not exacting, as he may, a special contract from his guests or boarders, can not be heard to say that his professions were false—that he was unlicensed, and not in fact an inn-keeper, bound to his duties, and answerable to his liabilities. The principles regulating the rights, duties and liabilities of an inn-keeper and guest have their origin and foundation in considerations of public policy, and are designed entirely for the protection and security of travellers and the transient public, who are compelled to intrust their property to the keeper of inns and hotels. The purposes of the statute are satisfied, when the keeper of an unlicensed house of entertainment is allowed large liberty in the making of a special contract with the guest or boarder. If he does not choose to exercise the liberty—if without a special contract he receives and entertains the guest—he can not devolve upon the latter the duty of inquiry whether he is licensed or unlicensed, and claim

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the absolution from liability the statute intends to secure only when it is stipulated for in a special contract. There was no error in sustaining the demurrer to the first special plea, and in the refusal of the charge requested.

The keeper of a public inn or hotel in a city, complying with the requirements of the statute (Code of 1876, §§ 1549-51), may relieve himself from liability for the loss of money, jewelry, watches, &c., within the inn or hotel, not occurring through his fraud, or the fraud of some clerk or servant employed by him. The statute is for the benefit of the inn-keeper, intended to afford him the opportunity of protecting himself from losses to which his fraud, or that of his servants, does not contribute. To the benefit he is not entitled, unless he gives notice to the guest that a safe depository for his money or other valuables is provided. The mere posting of notice on a single door of the hotel, however public it may be, is not a compliance with the statute, and will not justify the inference of notice to the guest. The application of the statute, under any state of facts, to this case, is not apparent. By its terms, the statute is limited to the keepers of inns or hotels in a city, and can not be extended to towns or villages, or to inns or hotels situate in the country. It is not shown that Evergreen is a city, and in the absence of evidence of that fact, the charge of the court upon this point is abstract.

The true relation of the plaintiff was that of a guest, and not that of a boarder. He was the resident of another town, visiting Evergreen for the mere temporary purposes of his business. There may be, sometimes, much of difficulty in determining whether the relationship of guest exists. But, when the character of traveller, of mere transient or temporary visitor, exists, and is retained, the relation of guest and inn-keeper exists. † Wait's Actions and Defenses, 2; Story on Bailments, § 477; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417. The simple fact that the plaintiff contracted for board and lodging at a less price than the defendant usually charged, does not change the fact that he was a mere traveller, or temporary, transient visitor. The inn-keeper, like a common carrier, may contract to serve one person for a less sum than he usually serves others, but the relation or liability he bears is not thereby changed. In *Berkshire Woolen Co. v. Proctor*, *supra*, the court said: "The simple fact that Russell made an agreement as to the price to be paid by him by the week, would not, upon any principle of law or reason, take away his character as a traveller and guest. A guest for a single night might make a special contract as to the price to be paid for his lodging and whether it were more or less than the usual price, it would not affect his character as

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guest. The character of guest does not depend upon the payment of any particular price, but upon other facts."

In the admission of evidence of the conduct, demeanor, or appearance of the servant, George Richardson, subsequent to the loss of the money, while on trial charged with its larceny, the Circuit Court erred. If then his conduct, demeanor or appearance, was indicative of guilt, the fact would have been competent evidence against him, as would have been his confession then made. But by his acts, or declarations, subsequent to the loss of the money, his employer could not be affected.—*Elcox v. Hill*, 98 U. S. 218.

There was no error in admitting the evidence of the plaintiff, that he knew and recognized the walk of the servant, Richardson, in the hall, at or about the time of the discovery of the loss of the money. The point of objection is, that it was mere matter of opinion. So far as that may be true, it is of opinion formed from observation, dependent for his value upon the opportunities of observation, and, like the recognition of the human voice, incapable of higher evidence.

We have passed upon all the assignments of error which have been argued by counsel; and for the error pointed out, the judgment must be reversed, and the cause remanded.

McCarthy v. Nicrosi.

Action for Damages for Obstruction of Private Sewer.

1. *Easement in private sewer.*—A written contract between the owners of two adjacent lots, by which it is stipulated that a sewer shall be constructed, at their joint expense, through the lower lot, for the drainage of water from the upper, operates in the nature of a grant, and passes to the owner of the upper lot, when the sewer has been constructed, a private easement in the lower, or an incorporeal interest in the soil over which the sewer runs.

2. *Possession as evidence of title; unrecorded deed.*—The open, notorious, and exclusive possession of land by a purchaser, claiming the land as his own, though holding under an unrecorded deed, is constructive notice of his title, whether it be legal or equitable; but, if the purchaser and his vendor are both in possession when the deed is executed, and there is no change in the possession after its execution, a third person would not be charged with constructive notice of the deed, and would be entitled to protection against it.

3. *Contracts of infant; disaffirmance of.*—To avoid a deed, or other executed agreement, entered into during his minority, an infant is not required to do any act during the continuance of his minority: any voidable executed contract may be disaffirmed by him, if it relates to personal property, either before or after reaching his majority; but he can

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not conclusively avoid a deed or sale of lands until after he has attained his majority.

4. *Same*.—Such voidable contract may be affirmed, by unequivocally recognizing its continued existence and binding force; and it may be disowned by some distinct and positive act, leaving no room for doubt as to the intention—such as notice, suit, entry, plea, or other act of unmistakable intention. In case of an executed conveyance of real estate, or any interest therein, mere acquiescence will not operate as a ratification, unless continued until the statute of limitations has effected a bar; *a fortiori*, when he has in the meantime parted with the title.

5. *Same*.—If an infant creates by writing a private easement in his land, and afterwards conveys the land by absolute deed to another, and ratifies the deed after attaining his majority, his subsequent ratification of the contract creating the easement is inoperative as against the grantee in the deed.

6. *Revocation of easement*.—A sewer having been constructed through defendant's lot, at the joint expense of himself and plaintiff (who owned the adjoining upper lot), under a written agreement entered into while defendant was an infant, his disaffirmance of the contract on attaining his majority would operate as a revocation of the easement created by it; and plaintiff's continued use of the sewer, after such disaffirmance and revocation, would be a nuisance, which defendant might abate by obstructing the sewer.

APPEAL from the City Court of Montgomery.
Tried before the Hon. JOHN A. MINNIS.

GUNTER & BLAKEY, for appellants.

R. M. WILLIAMSON, *contra*.

SOMERVILLE, J.—The present case is an action of trespass, brought by the appellee, Nicrosi, against one McCarthy and others, for obstructing a sewer running through defendants' premises, in such manner as to cause the rain water to flow back on plaintiff's premises, thereby resulting in certain damages which are specially averred in the complaint. The only items of actual damage proved were—1st, the cost of constructing another sewer, for the future drainage of plaintiff's lot; 2d, the expense incurred in building the sewer obstructed, which was built, or repaired, under license from the defendant, McCarthy.

The plaintiff's right to this sewer is derived from a written contract in the nature of a grant from McCarthy to himself, made in November, 1876, by which it was stipulated, that the sewer should be constructed at the *joint expense* of the parties; and this was done in the fall of the following year, at a cost of about thirty-five dollars. Nicrosi was, under the provisions of this agreement, to have the right to the use of the sewer as a *conduit* for the flow of water by natural drainage from his premises. It is obvious that he thus acquired more than a mere license. It was a private easement, or incorporeal interest in the soil itself.—Walker's Amer. Law, 5th ed., 286.

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There is some controversy about the title to the lot through which this sewer was permitted to run. It was in the joint possession of the defendants, McCarthy, Mrs. Parker, and her husband. In August, 1876, it was purchased from one Sayre; Mrs. Parker paying the purchase-money, and the legal title being conveyed to McCarthy; the latter claiming it by various open acts of ownership. In October, 1876, it was conveyed by McCarthy to Mrs. Parker. This deed of conveyance was *not recorded*, nor did the plaintiff have actual notice of its existence.

The principle may be taken as admitted, that the open, notorious and exclusive possession of real estate by a vendee, holding under an unrecorded deed, and claiming the land as his own, is constructive notice of the vendee's title, whether it be legal or equitable in its nature.—Wade on Notice, § 273; *Ludlow v. Gill*, 1 Amer. Dec. 694, note; *Rupert v. Mark*, 15 Ill. 540; *Burt v. Cassety*, 12 Ala. 734; *Sawyers v. Baker*, 66 Ala. 292; *Hendricks v. Kelly*, 64 Ala. 388; *Brunson and Wife v. Brooks*, 68 Ala. 248. Where the possession of the vendor and vendee, however, is *joint* at the time of the sale and conveyance, and its ambiguity is not relieved by the vendor's subsequently vacating his occupancy, we apprehend that the reason of the foregoing principle would not apply. This joint possession would not operate as constructive notice of an unregistered deed, because there would be no visible act which is calculated to put strangers on inquiry as to the changed attitude or *status* of the title, created by a secret conveyance from the vendor to the vendee.—*Smith v. Yule*, 31 Cal. 180; Wade on Notice, §§ 302, 303; 3 Wait's Act. and Def. 450, 451. This principle is regarded as a just exception to the general rule, invoked by appellants' counsel, that when *several* persons are in possession of property, and one of them has the legal title, the possession is presumptively his in whom the legal title is vested.—3 Wash. on Real Estate, 117. Nor does it contravene the rule, that the possession of the tenant may be regarded as notice of his landlord's title (Wade on Notice, § 286), or that the possession by the husband, of the separate estate of the wife, may be referred to his representative capacity as her trustee.—*Brunson and Wife v. Brooks*, 68 Ala. 248. To operate as *notice* of an unregistered deed, however, the possession of the *vendee* must be *exclusive*, so far, at least, as concerns the vendor.—Wade on Notice, § 290.

The plaintiff, being the purchaser of the easement in question for value, would, under the influence of the principle above announced, be protected against the unrecorded deed from McCarthy to Mrs. Parker, both of whom were jointly in occupation of the lot through which the sewer was constructed.

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Wade on Notice, § 226; *Nolen v. Gwyn*, 16 Ala. 725; *Preston & Stetson v. McMillan*, 58 Ala. 84; Code, §§ 2200, 2201.

The question of controlling influence here, in our judgment, arises from the fact of McCarthy's *infancy*. At the time of his contract with the plaintiff—in November, 1876—he was under the age of twenty-one years; and the bill of exceptions shows that he elected to disaffirm the contract prior to the time when the present cause of action accrued, which was in August of the year 1879. There can be no doubt of the principle, that, in order to enable an infant to avoid a deed, or other executed agreement, no act on his part during the period of his infancy is necessary.—*Phillips v. Green*, 13 Amer. Dec. 124. And the authorities are equally uniform in holding, that, *after* reaching his majority, he can elect to confirm or disaffirm any voidable executed contract entered into by him while in a state of minority.—2 Kent's Com. 235-6; *Overbach v. Heermance*, 14 Amer. Dec. 546. It seems, too, to be the better doctrine, that this disaffirmance, or avoidance, may as well be effected *before*, as after majority, at least so far as concerns personal property.—Bishop on Contracts, § 276; 7 Wait's Act. & Def. 142-3. "As to the *time* of an infant's disaffirmance of his contract, it may be said in general," says Mr. Parsons, "that he can not avoid a sale of *lands*, conclusively, until of full age, although he may enter while under age, and take and hold the profits."—1 Parsons on Contr. 322.

The usual rule is, that any such contract may be affirmed by unequivocally recognizing its continued existence and binding force. So, it may be disavowed by some *distinct and positive act*, leaving no room for doubt as to the intention of the party. Bishop on Contracts, § 276. This may be effected by *notice* of disaffirmance, by *suit*, *pleas*, or *entry* upon real estate, or *other unmistakable act of dissent, or of confirmation*, as the case may be.—2 Kent's Com. 237-8; 1 Par. Contr. 322.

In the case of an executed conveyance of real estate, or any interest in it, *mere acquiescence* will not operate as a ratification. There must be some positive and unequivocal act performed for the purpose, which is inconsistent with the subsequent right to repudiate it, unless the sale and conveyance have been acquiesced in for a length of time sufficient to perfect a bar under the operation of the statute of limitations.—*Eureka Co. v. Edwards*, 71 Ala. 248. "The reason is, that by his silent acquiescence he [the infant] occasions no injury to other persons, and secures no benefit, or new rights, to himself."—2 Greenl. Ev. § 367, note 1; *Jackson v. Carpenter*, 11 John. 539; *Tucker v. Morehead*, 10 Pet. 58; 1 Parsons on Contr. 325.

The mere acquiescence of McCarthy in suffering the water to continue flowing through the sewer after he attained his ma-

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jority, which was in July, 1877, would not be such a positive act as that we could construe it into a ratification, even had he continued to be the owner of the premises. *A fortiori* is this true, in view of the fact that he had parted with the title by the deed to Mrs. Parker, executed in October, 1876. And if he first ratified the deed to Mrs. Parker after attaining legal majority, a subsequent ratification of his contract of grant to the plaintiff would be unavailing for any purpose.—*Derrick v. Kennedy*, 4 Port. 41 (s. c., 4 Smith's Cond. Rep. 137).

The ruling of the City Court was in conflict with these views, and, therefore, erroneous.

The evidence shows that McCarthy elected to disaffirm his contract soon after attaining his majority. This operated to revoke the easement conferred by it, and after such revocation the plaintiff no longer possessed the right of drainage through the sewer. His continued use of it for this purpose would be a nuisance, which the defendants would have a right to abate by obstructions, or in any other reasonable way not unnecessarily injurious to the plaintiff.—2 Greenl. Ev. §§ 466, 467.

These views render it unnecessary to consider the other assignments of error. In the rulings of the court on the evidence we see no error. These we do not consider at length, as they involve but the simplest of fundamental principles.

Reversed and remanded.

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Special Action on the Case for Damages.

1. *When appeal lies from nonsuit.*—An appeal is given by statute from a judgment of nonsuit, when taken on account of the adverse rulings of the court on questions arising during the trial which do not appear of record, and which must be reserved by bill of exceptions (Code, § 3112); but the statute does not apply to rulings on the pleadings, which are a part of the record proper.

2. *Conflict between judgment-entry and bill of exceptions.*—When there is a conflict between the judgment-entry and the bill of exceptions, as to matters of which the latter should properly speak, its recitals must control those of the judgment-entry.

3. *When action on the case lies.*—The principle is settled by repeated decisions, that an action on the case lies for the conversion, or illegal disposition of personal property, upon which the plaintiff had a mere lien, or equitable mortgage, on which he could not maintain an action of trover, trespass, or detinue.

4. *Mortgage or assignment of unplanted crops.*—At common law, unplanted crops, or other things not having an existence, actual or poten-

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tial, were not the subject of sale, assignment, or mortgage; but, in a court of equity, such sale, assignment or mortgage creates an equitable interest, which attaches to the property when it comes into existence, or is acquired, and which the court will enforce and protect against all other persons than *bona fide* purchasers without notice; and for the conversion, or illegal disposition of the property, with notice of the lien, an action on the case may be maintained.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. JOHN MOORE.

This action was brought by the appellants, suing as partners, against the appellees as partners, doing business under the firm name of N. J. Bell & Co.; and was commenced on the 19th May, 1882. The complaint contained the common count for money had and received, and a special count in these words: "Plaintiffs claim of defendants the further sum of two hundred dollars, for this: that on the 1st November, 1881, plaintiffs held and owned a promissory note executed to them by Green Cook and Willis Price, on the 17th November, 1880, and due October 1st, 1881, on which there was due on the 1st November, 1881, after allowing all proper credits, the sum (to-wit) of two hundred dollars; to secure which said sum so due on said note, plaintiffs held a conveyance, commonly called a mortgage, on certain personal property therein named, and also on the crop of cotton and corn which said Cook and Price might raise during the year 1881 on the plantation known as the 'Gilchrist place,' which was at that time held and occupied by said Cook under a lease for the year 1881. And plaintiffs aver that said mortgage was duly probated and recorded, in the probate office of Lowndes county, Alabama, on the 14th January, 1881; and that said defendants, having full notice and knowledge of plaintiffs' right to, and lien on said crop of cotton and corn, so raised by said Cook and Price on said place in 1881, by virtue of said mortgage, did, to-wit, on said 1st day of November, 1881, receive from said Cook, of said crop, to-wit, eighteen bales of cotton, and nine hundred bushels of corn, worth (to-wit) fifteen hundred dollars; which said cotton and corn, plaintiffs aver, was sold by said defendants for a large sum, to-wit, fifteen hundred dollars; which said sum, plaintiffs aver, was received therefor by said defendants. And plaintiffs aver that said defendants received said moneys, well knowing plaintiffs' right thereto under said mortgage, and failed and refused, and still fail and refuse, though often requested so to do, to pay the same to said plaintiffs, with interest thereon."

The judgment-entry is in these words: "Came the parties," &c.; "and the defendants' demurrer to the second count in the complaint is overruled, and their demurrer to the complaint because of a misjoinder of counts is sustained; and the plain-

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tiffs amend their complaint, by striking out the first count. Thereupon, by leave of the court, plaintiffs take a non-suit, with leave to take a bill of exceptions, and move to have the same set aside in the Supreme Court. It is therefore considered by the court, that the defendants go hence without a day, and recover of the plaintiffs the costs by them expended; for which let execution issue," &c.

The bill of exceptions recites, that "the cause came on to be tried, on issue joined on the plea of not guilty, and thereupon the following proceedings were had: The plaintiffs introduced in evidence, with proof of its execution, a mortgage executed to them by Green Cook and Willis Price, on the 17th November, 1880, conveying to said plaintiffs all crops of cotton and corn to be raised and grown by said Cook and Price, during the year 1881, on a plantation in said county of Lowndes known as the Gilchrist place; and proved that said mortgage was deposited for registration, in the office of the probate judge of said county, on the 1st January, 1881, and was recorded in said office on the 14th January, 1881. The evidence tended to show, also, that said Green Cook had been in possession of said Gilchrist plantation, without cessation, for fourteen years, until this time; that such possession commenced in 1868, under a lease for one year; that he rented said lands, in January of each succeeding year, for said several years; that he had never ceased to cultivate said lands during said period of fourteen years; that he would speak to the landlord, before January of each year, about his continuing on the land for the current (?) year, but made no contract for the rent until after the 1st January of each year; and that the contract for the rent of the year 1881 was made in February of that year. The evidence tended to show, also, that said Cook raised on said land, during the year 1881, a crop of cotton and corn; and that, after paying the rent, a portion of said cotton, some six or seven bales, were sold and delivered to said defendants, who sold the same for ten cents per pound. The court thereupon charged the jury, that if Cook did not own the land, and if he held it under a renting for the year 1880, and at the time plaintiffs' mortgage was executed had no contract of rent with the landlord for the year 1881; then the crops which said Cook contemplated raising on said land in 1881, and which were then unplanted, were not the subject of sale or mortgage in November, 1880." The plaintiffs excepted to this charge, and then requested two charges in writing, which asserted, in substance, that on the facts stated Cook "had such an interest in the lands as to constitute the crops grown thereon in 1881 a proper subject of a mortgage." The court refused these charges, and the plaintiffs duly excepted to their refusal; "and thereupon," as

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the bill of exceptions then recites, "the plaintiffs took a nonsuit, with leave to move to set the same aside in the Supreme Court."

The charge given, and the refusal of the charges asked, are now assigned as error.

R. M. WILLIAMSON, with COOK & ENOCHS, for appellants.

WATTS & SONS, *contra*. (No briefs on file.)

BRICKELL, C. J.—1. The motion to dismiss the appeal can not be sustained. Originally, an appeal or writ of error would not lie from a judgment founded on a voluntary nonsuit, though the plaintiff elected to submit to it in consequence of decisions and rulings of the court adverse to his right of recovery. The statute now (Code of 1876, § 3112) authorizes submission to a nonsuit, and the review on bill of exceptions of the ruling or decision compelling the plaintiff to that course, or to submission to a final judgment barring another suit. The construction the statute has received is, that it is limited to such rulings and decisions of the court as are the proper matter of a bill of exceptions, and which, without a bill of exceptions, can not properly appear of record. To decisions made on demurrers to pleadings, which necessarily form part of the record, the statute does not apply, and an appeal will not lie from a judgment on a nonsuit taken in consequence of such decisions.—*Palmer v. Bice*, 28 Ala. 430; *Paulling v. Marshall*, 47 Ala. 270; *Darden v. James*, 48 Ala. 33. It is recited in the judgment-entry in this case, that the nonsuit was taken in consequence of the rulings of the court below on the demurrer to the complaint; and if the recital stood alone, or if the contrary was not otherwise shown clearly by the record, the motion to dismiss the appeal would be well taken. There is, however, a bill of exceptions taken to instructions to the jury given and refused by the court below, which is concluded with the recital, that, after the giving and refusal of the instructions, the plaintiff submitted to a nonsuit, with leave to move to set aside the same in this court. If the recital in the judgment-entry were taken as true in point of fact, the record would present the anomaly of a trial before a jury, after the cause was out of court in consequence of a nonsuit having been taken by the plaintiff; for, of course, the decision upon the demurrer to the complaint must have preceded the trial before the jury. It is essential that the record should affirmatively show that submission to the nonsuit was in consequence of the adverse rulings of the court; that it was not the mere election of the plaintiff to forbear the further prosecution of the suit.—1

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Brick. Dig. 88, § 52. The case is one, of not infrequent occurrence, where there is a conflict between the judgment-entry and the bill of exceptions, as to matters of which the bill ought to speak; and in such cases, the rule is well settled, that the recitals of the bill must be taken as true.—1 Brick. Dig. 252, § 139.

3. After the demurrer to the complaint, for a misjoinder of counts, was sustained, and the first count was stricken out, a single count was left, upon which the trial was had before the jury. The count is in case, for the conversion by the defendants, by sale, of cotton on which the plaintiffs claimed to have an equitable mortgage, of which the defendants had notice. It has been decided repeatedly in this court, that case is the appropriate remedy to recover damages for the conversion of chattels, upon which a party has a mere lien, or an equitable mortgage. Not having the legal title, upon which trover, trespass, or detinue could be supported, case lies, upon the general principle, that as there is a tortious act, from which damage results, the law must furnish a remedy; and as the established forms of action are inappropriate, case will be maintained, rather than the wrong shall go unredressed.—*Kelly v. McCaw*, 29 Ala. 231; *Hussey v. Peebles*, 53 Ala. 432; *Lomax v. LeGrand*, 60 Ala. 537; *Rees v. Coats*, 65 Ala. 256; *Grant v. Steiner*, 1b. 499; *Elmore v. Simon*, 67 Ala. 526.

4. The mortgage was executed in November, upon a crop of corn and cotton to be grown the succeeding year on a designated plantation, then in the possession of the mortgagor, under a lease for the year, and which he contemplated renting the next year, but had not made any contract therefor. The court instructed the jury, that, under these facts, the unplanted crops were not the subject of sale or mortgage. It is true, that unplanted crops, or other things not having an existence actual or potential, but the future acquisition of which is merely expected or contemplated, are not the subject of sale, assignment, or mortgage, according to the common law. A different doctrine, however, prevails in a court of equity. The sale, or mortgage, or assignment, does not pass the legal title to such property, unless, after it comes into existence, the vendor or mortgagor shall do some new act for the purpose of ratifying or carrying it into effect. Nevertheless, it creates an equitable interest, attaching to the property when it is acquired, or when it comes into existence, that a court of equity will enforce and protect against all persons other than *bona fide* purchasers without notice.—*Abraham v. Carter*, 53 Ala. 8; *Booker v. Jones*, 55 Ala. 266; *Stearns v. Gafford*, 56 Ala. 544; *Thrash v. Bennett*, 57 Ala. 156; *Grant v. Steiner*, 65 Ala. 499. Though the mortgagor had not, at the time of the mortgage, rented the

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lands on which the crops were to be grown, and the renting, like the crops which were to be grown, rested in mere expectancy; yet by the mortgage, which was founded on a valuable consideration, a lien or charge was created, which, in a court of equity, and upon plain principles of right and justice, attached to the crops as they came into existence, when the lands were rented subsequently. In view of the evidence, so far as it is recited in the bill of exceptions, the instruction is erroneous. The jury could have accepted it in no other sense than as operating the utter invalidity of the mortgage.

This error compels a reversal of the judgment, and the setting aside of the nonsuit; and the cause will be remanded.

Pearce v. Gamble & Bolling.

Bill in Equity by Receiver, acting under Decretal Order, to enforce against Attorneys Implied Trust in favor of Clients.

1. *Purchase by attorney, at sale under execution in favor of client.*—An attorney, having recovered a judgment for his client, and having the control thereof, can not, without the consent of his client, express or implied, become the purchaser of lands at a sale under execution issued thereon; and if he does so purchase, he becomes, like any other agent, a trustee for his client. Such a trust arises by operation of law, and continues until barred by lapse of time, or until terminated by an election to ratify the purchase, thereby giving it validity.

2. *Same; when receiver may enforce such implied trust.*—A receiver, appointed by the Chancery Court, succeeding to all the rights and remedies of the client, and authorized to sue, may file a bill to enforce this implied trust against the attorney; and the *onus* is on the attorney to show that the right has been lost by *laches*, or that the purchase has been ratified.

APPEAL from the Chancery Court of Butler.

Heard before the Hon. Jno. A. FOSTER.

The bill in this case was filed on the 12th July, 1882, by George A. Pearce, acting as receiver under a decretal order made by said Chancery Court, against John Gamble and John Bolling, attorneys at law and solicitors in chancery, practicing as partners; and sought to enforce against the defendants an alleged trust in favor of Preston & Stetson, in a tract of land which had been sold under execution in their favor against one John W. Wright, and which was bought at the sale by said Gamble & Bolling, who were the attorneys of record of said Preston & Stetson, and as attorneys had control of the judgment and execution. The judgment in favor of Preston &

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Stetson was rendered on the 16th June, 1876, and was for \$582.35; and the sale under execution was made in February, 1877, the price bid being \$40. The complainant was appointed receiver in a suit entitled "*G. B. Preston v. A. S. Stetson*;" and the order authorizing him to file the bill, which was made an exhibit, was rendered on the 11th July, 1882, and in these words: "This cause came on to be heard on the application of the receiver, made in open court, to file a bill in the Chancery Court of Butler county against Gamble & Bolling, to get a decree of that court to order a conveyance by them of certain lands in said county, alleged to be held by them in trust for said Preston & Stetson as late partners; and on consideration, said application is granted. It is therefore ordered, adjudged, and decreed, that said George A. Pearce, as receiver of this court in this cause, is hereby authorized and empowered to file such a bill in his own name as receiver, and to employ a solicitor for that purpose."

Bolling having been declared *non compos mentis*, a guardian *ad litem* was appointed to answer and defend for him. An answer to the bill was filed by Gamble, in which was incorporated a demurrer on the following (with other) grounds: 1st, "because the bill fails to show that the claim or demand here sued on is assets belonging to him as receiver for said Preston & Stetson;" 2d, "because the bill shows that complainant, as receiver of the property and rights of property of said Preston & Stetson, seeks to make said purchase of said real estate their purchase, and such election is not made by them;" 3d, "because the bill fails to show that any property of said Preston & Stetson, or any rights of property of theirs, was or is invested in said real estate." The chancellor sustained the demurrer on these grounds, and his decree is now assigned as error.

J. C. RICHARDSON, for appellant.—That a purchase by an attorney, of property sold in the course of the litigation in which he is employed, is voidable at the election of his client, or will be held to enure to the benefit of his client, see *Stockton v. Ford*, 11 How. U. S. 247; *Howell's Heirs v. McCreery's Heirs*, 7 Dana, 388; *Baker v. Humphrey*, 11 Otto, 500; *Hooper v. Perry*, 28 Iowa, 57; *Hawley v. Cramer*, 4 Cowen, 717; *Davis v. Smith*, 43 Conn. 269; *Hatch v. Fogerty*, 40 How. Pr. (N. Y.) 492; *Warren v. Hawkins*, 49 Mo. 137; *Michaud v. Girod*, 4 How. U. S. 555; *Hall v. Hallett*, 1 Cox, 134; *Rigno v. Binns*, 10 Peters, 279; *Dickerson v. Bradford*, 59 Ala. 581; *Walker v. Palmer*, 24 Ala. 358. That the complainant, as receiver, was authorized to sue, and was the only person who could bring the suit, see *Leonard v. Storrs*, 31 Ala. 388; *Booth v. Clark*,

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17 How. U. S. 331; *Coope v. Bowles*, 28 How. Pr. (N. Y.) 10; 8 Ga. 358; 15 Cal. 206; 4 Sandf. Ch. 417.

BUELL & LANE, contra.—The purchase by the defendants was made nearly five years before the complainant's appointment as receiver, and no fraud or misrepresentation is charged against them. The theory of the bill is, that as Preston & Stetson might have avoided the sale, or had the defendants declared trustees for their use and benefit, the complainant, as their legal representative, may exercise and enforce the same right of election. The order appointing the receiver is not set out, and the bill only alleges that he was appointed "receiver of the property and rights of property of Preston & Stetson." A receiver, generally, is simply the custodian of the property in litigation, with authority, in case of partnership property, to collect the assets, and convert them into money.—Kerr on Receivers, 182, note. The right to avoid such a purchase as this, or to have it declared a trust, is neither property, nor a right of property, but a simple privilege, or right of election, which can only be exercised by the parties themselves, and which the chancellor could not confer upon the complainant.—Perry on Trusts, § 198; Wharton on Agency, § 576; *Eastern Bank v. Taylor*, 41 Ala. 93; *Charles v. Dubose*, 29 Ala. 367; *Bott v. McCoy & Johnson*, 20 Ala. 578; 11 Howard, 331.

PER CURIAM.—The proposition can not be denied, that the appellees, being the attorneys for the firm of Preston & Stetson, could not purchase the land, under the judgment which was recovered and controlled by them, without the consent of their clients, express or implied. They were forbidden to make the purchase, on well-settled principles of public policy; and the law holds them to be trustees for their principals, in whose employment they were acting as agents. This is the general rule applicable to all agents and trustees, and attorneys at law constitute no exception to it.—Weeks on Attorneys at Law, § 273, and cases cited.

It required no election to raise this trust. It was raised by operation of law, and continued to exist until it was lost by lapse of time, or by an election to ratify the purchase. Unreasonable delay in enforcing the right, or an express or implied assent to the transaction, would alone give it validity. The right was one which would pass to a receiver who is authorized by the Chancery Court to bring an action, all the rights and remedies of the beneficiaries having passed to the receiver, whether legal or equitable in their nature.—High on Receivers, § 539; *Leonard v. Storrs*, 31 Ala. 488. The *onus* was on the appellees, to show

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that the right of action was lost by *laches*, or by ratification of the transaction; and this they have failed to do.

Reversed and remanded.

Harwell v. Lehman, Durr & Co.

Bill in Equity for Foreclosure of Mortgage.

1. *Filing bill in wrong district; how objected to.*—When a bill shows on its face that it is not filed in the proper district, it is subject to demurrer, or may be dismissed on motion; and if the fact does not appear on the face of the bill, a plea in the nature of a plea in abatement is the proper mode of presenting the objection.

2. *Where bill may be filed; who is material defendant.*—A material defendant, as the term is used in the statute specifying the several districts in which a bill may be filed (Code, § 3760), means a necessary or indispensable party, as distinguished from one who is merely a proper party.

3. *Same; parties to bill for foreclosure.*—When a junior mortgagee files a bill, asking a foreclosure of his mortgage, an account of both of the mortgage debts, and a sale of the property free from the incumbrance of both mortgages, the senior mortgagee is a necessary and indispensable party; and the bill may be filed in the district in which he resides.

4. *Same; where mortgage has been assigned.*—If the senior mortgage has been assigned, absolutely and unconditionally, leaving in the mortgagee no interest in it or the debt secured by it, the assignee would be a necessary party to a bill for foreclosure filed by a junior mortgagee, and the senior mortgagee would be only a proper party; but, if the assignment was conditional, and the condition had not been performed when the bill was filed, the assignor would be a necessary party, and the bill might be filed in the district of his residence; and being so filed, the subsequent performance of the condition, whereby the assignment became absolute, would not divest the jurisdiction of the court, nor be good ground for dismissing the bill.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on March 10th, 1882, by the partners composing the firm of Lehman, Durr & Co., a partnership doing business in the city of Montgomery, against A. O. Harwell and L. S. Driver, who were resident citizens of Coosa county; and against the partners composing the firm of Tatum & Wilkinson, a mercantile firm doing business in the city of Montgomery, where the partners also resided. The bill sought the foreclosure of a mortgage executed to the complainants by said A. O. Harwell, conveying several lots and parcels of land situated in Coosa county, together with personal property particularly described; an account of the mortgage debt,

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and an account of a debt due to said Tatum & Wilkinson (or their assignee, L. S. Driver)) which was secured by an older mortgage on the same property, and on which large payments were alleged to have been made; a sale of the property freed from the incumbrance of the mortgages, and the application of the proceeds of sale to the satisfaction of the secured debts in the order of their priority. A plea to the jurisdiction was filed by the defendants, on the ground, that the bill ought to have been filed in Coosa county, instead of Montgomery; and the appeal was taken from the chancellor's decree sustaining a demurrer to the plea.

SMITH & MACDONALD, with whom was L. E. PARSONS, Jr., for appellants, cited *Lewis v. Elrod*, 38 Ala. 17; *Waddell v. Lannier*, 54 Ala. 440; *Milner v. Ramsey's Adm'r*, 48 Ala. 287; *Tindal v. Drake*, 51 Ala. 574; *Campbell v. Crawford*, 63 Ala. 392; *Bolling v. Munchus*, 65 Ala. 558; *Ashurst v. Gibson*, 57 Ala. 584.

E. P. MORRISSETT, *contra*, cited *Broughton v. Mitchell*, 64 Ala. 220; *Lewis v. Elrod*, 38 Ala. 17.

BRICKELL, C. J.—A bill in equity, instituting suit between citizens of the State, must be filed in the district of the residence of a material defendant; or, if the purpose is to enjoin proceedings in other courts, it may be filed in the district in which such proceedings are pending; or, if the subject-matter of suit is real estate, it may be filed in the district in which such real estate (or a material part thereof) is situated.—Code of 1876, § 3760. A bill, disclosing on its face that it is not filed in the proper district, is subject to demurrer, or may be dismissed on motion. If the fact does not appear on the face of the bill, a plea in the nature of a plea in abatement is the appropriate mode of presenting the objection.—*Campbell v. Crawford*, 63 Ala. 392.

The present bill by a junior mortgagee, for the foreclosure of a mortgage on real and personal property, was filed in the district of the residence of the senior mortgagees, who are made parties defendant; the property being situate, and the mortgagor and assignee of the senior mortgage residing, in another district. The averments of the bill are, that the debt of the senior mortgagees has been largely reduced by payments, and that by some arrangement between them and one Driver, without having parted absolutely with all interest in the mortgage, the latter obtained from them possession of the mortgage, and claims some interest under it, the nature of which is unknown. The plea avers the residence of the mortgagor, and of

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Driver, and the locality of the property, to be in another district than that in which the bill is filed, and a transfer of the mortgage to Driver, upon a condition which was not performed until after the bill was filed. The plea was overruled by the chancellor.

The purpose of the statute, in limiting suits in equity to the residence of a material defendant, as has been heretofore explained, like that of the statute limiting personal actions at law to the county of the permanent residence of a freeholder or householder, is, that parties may not be drawn into litigation in localities distant from their residence. In courts of equity, the general rule, founded on the highest considerations of public policy, is, that all persons materially interested in the subject-matter and object of suit, however numerous they may be, must be made parties.—Story's Eq. Pl. § 72. In their absence, the court can not render a decree which will be final and complete, silencing all future controversy, avoiding the necessity for a multiplicity of suits; nor can the court be certain that the decree it renders is founded on a consideration of the merits of the whole case, and that injustice may not result from it. Courts of law are, ordinarily, satisfied when the parties having the legal, though it is separable from the beneficial interest, are drawn before them; and, generally, have not power to require the presence of other parties. As the rules of a court of equity may require the presence of numerous parties, having different places of residence, the statutory limitation is met, whenever the bill is filed in the district of the residence of a *material* defendant. There are necessary and proper parties to a suit in equity—parties in whose absence the court will not proceed, and parties who may be properly brought before the court, without subjecting the bill to the objection of misjoinder. The present case may be employed as an illustration. The purpose of the bill being the foreclosure of a junior mortgage, a sale of the property mortgaged, free from incumbrances of both mortgages, the senior and the junior, the ascertainment of the real amount of the senior mortgage debt; the court could not, and would not, proceed to a decree in the absence of the senior mortgagee—he would be a necessary, indispensable party. But, if he had assigned the mortgage and mortgage debt absolutely and unconditionally, parting with all interest, the assignee would become the necessary, indispensable party, and the mortgagee would be, at best, merely a proper party.—*Prout v. Hoge*, 57 Ala. 28. It is the residence of a *necessary*, as distinguished from a mere *proper* party, which is the element of the jurisdiction of the court—a party having a real interest in the suit, and against whom a decree is sought.—*Lewis v. Elrod*, 38 Ala. 17. The senior mortgagees were, when the bill was filed, par-

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ties of this description, according to the averments of the bill, and the averments of the plea. They had parted with the mortgage, not absolutely, but upon a condition which might never be performed. It is more proper to say, that they had merely agreed to part with it, if Driver made the promised payment to them. Until the payment was made, they remained the mortgagees, having the exclusive right to receive payment of the mortgage debt. The performance of the condition by Driver, subsequently to the filing of the bill, could not retroact, and divest the court of a jurisdiction which had rightly attached.

Affirmed.

Pollak & Co. v. Graves.

Statutory Claim Suit for Horses.

72	340	7
98	310	
72	340	
114	484	

1. *Conveyance of wife's property.*—Property belonging to the statutory estate of a married woman, whether real or personal, can only be disposed of in the particular mode prescribed by the statute; that is, by the joint conveyance in writing of herself and her husband, attested or acknowledged as prescribed.

2. *Same; sale or exchange of horse.*—If the husband purchases a horse with money belonging to his wife's statutory estate, not taking the title to himself, the legal title vests in the wife; and a subsequent exchange of the horse for another, not consummated by writing signed by husband and wife jointly (and attested or acknowledged), though made with the assent of the wife, does not divest her title to the first horse, nor vest in her any title to the second.

3. *What will support claim suit.*—On the trial of a statutory claim suit, the claimant must recover, if at all, on the strength of his own title; and it being shown that, at the time of the levy, the property was in the possession of the defendant in the writ, the claimant can only repel the presumption of ownership, arising from such possession, by showing title in himself, or by connecting himself with the outstanding title of a third person.

4. *Purchase by husband, for wife; title not passing to her.*—If the husband buys personal property at the request of the wife, but pays the price with money borrowed by him on his own credit, the title vests in him, not in his wife; and the subsequent re-payment of the borrowed money, with money belonging to the wife's statutory estate, does not change the title, nor create in the wife any interest in the property which she can assert at law as against his creditors.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. JOHN MOORE.

This was a statutory trial of the right of property in two horses, on which an execution was levied in favor of Pollak &

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Co., against M. A. Graves, and to which a claim was interposed by Mrs. Dolsica R. Graves, the wife of the defendant in execution. The plaintiffs' judgment was rendered on the 3d November, 1881, and was founded on the defendant's promissory note dated April 3d, 1880. The execution was levied on March 13th, 1882, on the two horses now in controversy, which were described in the levy as "one grey horse, named *George*, and one sorrel mare, named *Lillie*." On the trial of the claim suit, as the bill of exceptions recites, the plaintiffs proved their judgment and execution, the date of the note on which the judgment was founded, the levy of the execution on the horses, "which were at that time in the possession of said M. A. Graves," and their value; "but the same witness testified, also, that said M. A. Graves had always declared that the horses belonged to his wife, the claimant in this suit." The plaintiffs then examined said M. A. Graves as a witness, "who testified that the title to the two horses was derived as follows: In November, 1880, witness purchased at the request of his wife, from one Hinson, who owed her moneys belonging to her statutory estate, a black horse; promising at the time, by the expressed wish of his wife, to credit the price of the horse on such indebtedness, which was afterwards done. In April, 1881, with the consent and approval of his wife, witness traded said black horse, to one Belgart, in exchange for the grey horse *George*, and informed said Belgart that the black horse belonged to his wife; but no written contract of sale or exchange, nor any writing whatever in regard to such exchange, was made—the same being a verbal trade, consummated by delivery only. The said mare *Lillie* was purchased at the request of claimant, in January, 1881, from a drover, and paid for with money borrowed by witness from one Tyson, promising to repay it out of moneys belonging to his wife's statutory estate, when he should collect them from said Hinson,—which was afterwards done; all of which was understood and assented to by his wife. Both horses were traded for, as here set forth, with the consent and approval of witness' said wife, and were turned over to her; and witness never claimed title to them, but claimed only the use, and did use them; and both horses were procured, as set forth, after the debt of witness to said plaintiffs was contracted, but before judgment was rendered thereon. This was all the evidence in the case, and there was no conflict in the evidence."

The court thereupon charged the jury as follows: 1. "If the jury believed, from the evidence, that the grey horse was procured by the exchange of the black horse belonging to the claimant's statutory estate; and that the exchange was made by claimant's husband, with her knowledge, consent, and approval, and that the grey horse was delivered to the claimant, and was

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never claimed by her said husband, the defendant in execution, but was claimed by her; then they must find that said grey horse was not subject to plaintiffs' execution, although they might also believe, from the evidence, that said contract of exchange was verbal only, and was made after plaintiffs' said debt had been contracted." 2. "If the jury believed, from the evidence, that the mare *Lillie* was purchased in January, 1881, with money borrowed by claimant's said husband from Tyson, on his promise to repay Tyson out of moneys, the statutory separate estate of his said wife, afterwards to be collected; and that said arrangement was made with the consent and approval of his wife, the present claimant; and that he did so repay said Tyson with such moneys when collected, and turned said mare over to said claimant, and never claimed any interest in her, but only the use; then they must find said mare not subject to plaintiffs' execution." The plaintiffs excepted to each of these charges, and requested others, instructing the jury that, if they believed the evidence, they must find each of the horses subject to the execution; which charges the court refused, and exceptions were reserved to their refusal.

The charges given, and the refusal of the charges asked, are now assigned as error.

SAYRE & GRAVES, with W. R. HOUGHTON, for appellants. The exchange of the black horse for the grey, by verbal contract only, did not divest the claimant's title to the former, nor vest in her any title to the latter.—*Williams v. Auerbach*, 57 Ala. 90; *Evans v. English*, 61 Ala. 424. The mare was purchased by the claimant's husband, and paid for with money borrowed by him for the purpose. This was the husband's debt, though he may have promised to pay out of his wife's money; and the lender could not have subjected the wife's property to its payment. The subsequent use of the wife's money in paying the debt did not change the legal title to the property, which vested in the husband from the time of its delivery.—*Crutcher v. Taylor*, 66 Ala. 216.

COOK & ENOCHS, *contra*.—The legal title to each of the horses was vested in the claimant, and the marital rights of her husband never attached to either. Each was bought for the wife, and was paid for with her money or property; and the husband always recognized her right, and disclaimed any interest in himself.—*Daffron v. Crump*, 69 Ala. 77; *Smith v. Whitfield*, 71 Ala. 106; *Machen v. Machen*, 38 Ala. 364; s. c., 28 Ala. 374.

BRICKELL, C. J.—Under the statutes, a married woman takes and holds property to her sole and separate use, having.

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therein a legal estate. But upon her the statutes do not confer a general power to dispose of such property. The power of disposition is limited, and is confined to the specific mode the statutes prescribe. The joint conveyance in writing of herself and husband, attested or acknowledged, is the only mode of disposing of such property that will operate to divest her title, whether a sale is intended, or an exchange—the bartering one article of personal property for another.—*Smyth v. Oliver*, 31 Ala. 39; *Whitman v. Abernathy*, 33 Ala. 154; *Warfield v. Ravisies*, 38 Ala. 518; *Bolling v. Mock*, 35 Ala. 727; *Evans v. English*, 61 Ala. 416; *Williams v. Auerbach*, 57 Ala. 90. The black horse, having been purchased with the moneys of Mrs. Graves, was her separate property. In making the purchase, the husband may have been the active agent; but it was within the line of his duty as trustee to invest the money of the wife, and having invested it in the purchase of the horse, not taking title to himself, the legal title enured directly to the wife. The exchange of the horse subsequently, though with the assent of the wife, not having been consummated by the joint transfer in writing of herself and husband, attested or acknowledged, did not divest her legal title, nor clothe her with title to the mare received in exchange. In the absence of statutes otherwise requiring, the title to personal property may be created or divested without writing. The effect of the statute enabling husband and wife to dispose of the separate statutory estate of the wife, not distinguishing between real and personal property, or between things in possession and things in action, is, that the title of the wife can not be divested without writing, whatever may be the kind or species of the property. If Mrs. Graves has an election, either to reclaim the black horse, or to ratify the exchange and take the mare, it is by virtue of the doctrine of implied or constructive trusts, of which a court of equity only can take cognizance and enforce.—*Bolling v. Mock*, *supra*; *Evans v. English*, *supra*. The title to the grey mare not having vested in Mrs. Graves, her claim can not be supported. A claimant, in a trial of the right of property, must recover upon the strength of his own title, and not upon the weakness or want of title in the defendant in execution or attachment. When it is shown by the plaintiff that, at the time of the levy, the defendant had possession of the property, a presumption of ownership arises. The presumption can be repelled only by the claimant proving title in himself, or connecting himself with the true title, if it be not in the defendant. It is immaterial to him whether the defendant has title, or whether it resides in a stranger.—2 Brick. Dig. 480, § 67. The mare may not be the property of the husband. The person with whom the exchange was effected

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may have a right to rescind it. If this be true, it will not aid Mrs. Graves' claim.

The mare Lillie was purchased by the husband, with money he had borrowed on his own credit. The fact that the purchase was made at the request of the wife, is unimportant. She has not the capacity to contract for the purchase of property, or to acquire and hold it by purchase, unless the consideration of the purchase is derived from her statutory separate estate. The subsequent payment by the husband of the money he borrowed to make the purchase, with the moneys of the wife, rendered him the debtor of the wife, but it did not create any trust of the title to the mare. The title vested in him on the purchase, and the mare became subject to the payment of his debts.

From what has been said it follows, that there was error in the rulings of the court below; and the judgment must be reversed, and the cause remanded.

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Bill in Equity for Foreclosure of Mortgage.

72	351
99	243
72	351
121	485

1. *Parties to bill for foreclosure.*—The personal representative of the deceased mortgagor is a necessary and indispensable party to a bill which seeks to foreclose a mortgage on lands, unless it is shown that the assets in his hands are discharged from all liability for the debt.

2. *Non-joinder of parties; how taken advantage of.*—While the general rule is, that an objection for the want of parties must be taken by demurrer or plea, or be insisted on in the answer; yet the want of an indispensable party—one in whose absence a decree can not properly be rendered—is available on the hearing, or on error.

3. *Reference to register before decree of sale.*—When the defendants to a bill for foreclosure are all adults, and do not suggest or claim, in the court below, that the mortgaged premises are susceptible of division, and that a sale of a part only will be sufficient to satisfy the mortgage debt, the court may decree a sale without a reference as to these matters; but, if some of the defendants are infants, or not *sui juris*, it is irregular and erroneous to render a decree of sale, without a prior reference to the register to ascertain and report whether the premises are susceptible of division, whether a sale of part only would not be sufficient, whether the interest of the infants requires a sale in parcels, and what parcel should be first sold.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. JNO. A. FOSTER.

The bill in this case was filed on September 7th, 1880, by Patsey Williams, against the widow and children of Daniel Boyle, deceased; and sought the foreclosure of a mortgage, which said Daniel Boyle had executed to the Central Building

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and Loan Association, a private corporation organized under the general laws, and doing business in the city of Montgomery. The complainant claimed to be the assignee of the mortgage and secured note, and alleged that the corporation was dissolved and its affairs settled and closed. The mortgage, as shown by the copy made an exhibit to the bill, was without date, though the note secured by it was dated "February, 1871;" conveyed a lot in the city of Montgomery, as security for the payment of the note according to the provisions of the constitution and by-laws of the corporation; and purported to be signed by said Daniel Boyle and his wife. The bill alleged that said Daniel Boyle died intestate, leaving three children as his heirs, whose names were mentioned, and who were alleged to be under fourteen years of age, and residing with their mother; and that letters of administration on his estate had been granted to his widow, Mrs. Mary Boyle, who was made defendant to the bill, but not in her representative character. Summons was returned duly executed on all of the defendants. A guardian *ad litem* seems to have been appointed for the infant defendants, and to have filed an answer for them; but neither the order appointing him, nor his answer, is set out in the record; nor does the record show that any answer was filed by the widow, or any decree *pro confesso* entered against her. At the April term, 1881, as the minute-entry recites, the cause was "submitted for decree, on the bill and exhibits, answer of guardian *ad litem*, and testimony;" and the chancellor thereupon ordered a reference to the register, to state an account of the mortgage debt. The register made his report at the same term, and it was confirmed without objection; and the cause being submitted for decree, the chancellor rendered a decree of sale. The sale was made, and was reported to the court at its next term, the complainant in the bill becoming the purchaser. At the same term, after the confirmation of the sale, a petition was filed by Mrs. Boyle, alleging that she had no notice of the suit, that process was never served on her, and that she had a complete defense against the mortgage; denying its execution and validity on grounds particularly specified. The petition was supported by affidavits, and there were counter affidavits as to the service of process. The chancellor overruled and dismissed the petition, but without passing on its merits; holding that the former decree was final and conclusive, and could only be revised on error or appeal. The appeal is sued out by all the defendants, and errors are here assigned by them jointly.

GEO. F. MOORE, for appellants.

JAS. WEATHERLEY, *contra*.
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BRICKELL, C. J.—The bill discloses that there is a personal representative of the deceased mortgagor, his widow, who joined with him in executing the mortgage; and yet fails to make her a party in her representative capacity. It is the settled rule in this State, that to a bill to foreclose a mortgage on lands, the personal representative of the deceased mortgagor is an essential party, as representing the personal estate, unless it is shown that the assets in his hands to be administered are discharged from all liability for the mortgage debt.—*Dooley v. Villalonga*, 61 Ala. 129. While it is the general rule, that an objection for the want of parties must be taken by demurrer, or by plea, or be insisted on in the answer; yet the want of an indispensable party, in whose absence a decree can not be properly rendered, may be taken advantage of on the hearing, or on error.—*McMaken v. McMaken*, 18 Ala. 576; *Prout v. Hoge*, 57 Ala. 28.

The heirs of the deceased mortgagor are infants; and a decree for the sale of the entire mortgaged premises was rendered, without a reference to the register to ascertain and report, whether the premises were susceptible of division; whether a sale of a part would not satisfy the mortgage debt; whether the interest of the infants did not require a sale in parcels, and the parcel which should be first sold. A decree of sale of mortgaged lands which have descended to infants, or other persons not *sui juris*, is irregular without such a reference.—2 Brick. Dig. 260, § 169. If the parties are *sui juris*, and do not in the Court of Chancery suggest or claim the reference, on error they will be deemed to have waived it.—*Ticknor v. Leavens*, 2 Ala. 149. The rule is otherwise, as to parties laboring under disabilities.

We do not deem it necessary to consider any of the other assignments of error, as the matters to which they refer, so far as of importance, can be remedied in the future progress of the cause in the Court of Chancery.

For the errors pointed out, the decree must be reversed, and the cause remanded.

72	354
93	341
72	354
d192	178

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Action for Money Had and Received, under Common and Special Counts.

1. *Waiver of trial by jury; agreement for, on former trial.*—A written agreement in a civil cause, entered into by the parties or their attorneys of record, submitting the cause to the decision of the court without the intervention of a jury (Code, § 3029), being in abrogation of a valuable constitutional right and privilege, will not be construed to be binding on another trial at a subsequent term; particularly where a new party, in the meantime, has been introduced by amendment.

2. *Erasure or alteration in record offered in evidence.*—When a record, or other written instrument offered in evidence, presents the appearance of an erasure or alteration, and there is ground of suspicion as to it, whether shown by inspection or by extrinsic evidence, the party offering it is required first to remove the suspicion by explaining the erasure or alteration; but, where the erasure or alteration bears no such ear-mark of fraudulent intent—as in this case, where the date of a will admitted to probate appears to have been changed from 1875 to 1873, and the record elsewhere shows that the testator died prior to 1875—the better doctrine is, that the change or correction will be presumed to have been made at the time the instrument was executed.

3. *Probate of will, and revocation thereof, in Louisiana.*—A proceeding to revoke the probate of a will, like an application for its probate, is a proceeding *in rem*; and notice thereof to non-resident persons who are interested must, of necessity, be constructive, as authorized by law; and under the laws of Louisiana, as proved in this case, this constructive notice is given by the appointment of a *curator* to represent and protect the interests of such non-residents.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

The record in this case shows, that two separate actions were commenced on the 29th December, 1877, in favor of Mrs. Mary Ann King, a married woman, residing in Ohio; one of said actions being against Almira A. Martin, and the other against Josephine Martin, both of whom were residents of said county of Mobile. The two actions involved the same facts and issues, and were tried and submitted together. In each action, the plaintiff sued to recover money alleged to have been had and received by the defendant, to and for the use of the plaintiff. The plaintiff was a surviving sister of one John Martin, who was a resident citizen of Louisiana at the time of his death, and who died at Bladen Springs, Alabama, in July, 1875; and the defendants were nieces of said John Martin. The money claimed and sued for was assets of the estate of said John Mar-

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tin, and was received by the defendants as "universal legatees" under a will which was admitted to probate in the Second District Court of New Orleans, and of which one J. P. Vairien was appointed the executor; and the plaintiff claimed a portion of the money so received by the defendants, as her distributive portion of the estate, on the ground that the probate of said supposed will had been revoked by the same court which granted it, and that the decedent in fact died intestate. On the first trial, the cause having been submitted to the court for decision without the intervention of a jury, by written agreement entered of record (Code, § 3029), the court rendered judgment for the plaintiff in each case; but the judgment was reversed by this court on appeal, on the ground that the plaintiff's husband ought to have been joined with her as a party plaintiff, and the cause was remanded.—*King v. Martin*, 67 Ala. 177.

After the remandment of the cause, the complaint was amended, by joining the plaintiff's husband as a co-plaintiff with her, and adding a special count claiming the money sued for as Mrs. King's distributive share of the estate of her said deceased brother; and issue was joined on the plea of the general issue. The defendants also pleaded two special pleas, each averring that they received the money, not for the use and benefit of the plaintiff, but as their own absolute property, under an order and decree of the Second District Court of New Orleans; and there was a replication to these special pleas, averring the setting aside and cancellation of said order and decree; to which replication a demurrer was interposed, but overruled. On the trial, the parties having announced themselves ready, the defendants demanded and insisted on a trial by jury; but the plaintiffs insisted that the agreement entered into at the former trial was still binding, and that the cause should be tried by the court without the intervention of a jury. The court held that the agreement was still binding, and proceeded to try the cause without the intervention of a jury; to which ruling and decision an exception was duly reserved by the defendants.

"On the trial," as the bill of exceptions further states, "the plaintiffs offered in evidence a paper purporting to be a transcript of the record of the proceedings of the Second District Court of New Orleans, Louisiana, in a certain cause wherein Mary Ann King was petitioner, against John P. Vairien, Josephine Martin, and Almira A. Martin, as defendants; which was a suit, or proceeding, to annul a will of John Martin, alleged to have been probated in said court, and to annul the orders and decrees of said court putting Josephine and Almira A. Martin in possession of his said estate. In and by said transcript it appeared, on pages two (2) and thirty-three (33) thereof, that an erasure and change had been made in the description

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of the year of the making of the said will sought to be set aside, whereby the year 1875 was evidently changed to 1873, and apparently in a different handwriting, and with different pen and ink ; which original record or transcript is, by the order of said Circuit Court, in accordance with the rule of practice (No. 20) in such case made and provided, hereunto attached as an exhibit, for the inspection of the Supreme Court. When plaintiffs offered said transcript in evidence, the defendants objected to its admission, and moved to exclude it unless and until plaintiffs should first explain said manifest alteration of the record ; which objection the court overruled, and admitted said record as evidence, showing the date aforesaid to be 1873, when the original date, as written in said transcript, was 1875 ; to which ruling, admitting said record as evidence without explanation of said apparent alteration, defendants then and there excepted.

“ Defendants objected to the admission of said record as evidence, also, for the further reason, that the same was an exemplification of the proceedings in a suit brought by said Mary Ann King against said J. P. Vairien and these defendants, to vacate and annul the probate of the will of said John Martin, under which defendants received said Martin’s estate, and the orders under which defendants had received part of said property as legatees under the will of said Martin, and brought the same into this State ; and that in and by said record it nowhere appeared that any personal service of process in said cause had been made on these defendants, nor any attachment or other process levied on their property ; nor that they, or either of them, had any property whatever in the State of Louisiana at the time of the bringing of said suit ; nor that they, or either of them, had appeared in said suit, either in person or by attorney ; but that a *curator ad hoc* had been appointed to represent these defendants as non-residents, by said Louisiana court, on plaintiff’s motion in said court. Wherefore defendants objected to the introduction of said transcript as evidence against them, and claimed that said proceedings were not binding on them, but were, as to them, *res inter alios acta*. But the court overruled said objection, and admitted said transcript as evidence ; to which ruling and decision defendants excepted.

“ There was evidence, as appeared by said transcript, and by the depositions of John P. Vairien and Mary Ann King, introduced by the plaintiffs, that plaintiffs are husband and wife, and reside in Ohio, and have resided there for more than twenty years last past ; and that defendants held, and had and received the money sued for, as legatees of John Martin, deceased, under the will made in 1873, and duly probated in Louisiana, and which was afterwards annulled and cancelled in the Supreme Court of said State ; and that said Martin was

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domiciled in Louisiana at the time of his death, and had been for twenty years prior thereto; and there was evidence, also, showing the heirship of said Mary Ann King to the amount of one-third of said Martin's estate, if he died intestate, and the receipt by the defendants, on the 24th August, 1875, of one-half of \$6,625 each, of the moneys of said estate, from the said executor, under the decree of said court in which said will was probated; and there was evidence also, by said transcript, showing the proceedings had in said District Court, the annulment of the said decree of probate, and the order putting said defendants in possession of said estate. The plaintiff introduced in evidence, also, the laws of Louisiana contained in the Civil Code, with leave to each party to read from the same all articles therein applicable to their case; and also the following Reports of the Supreme Court of Louisiana: 6 La. Rep. 406; 12 La. Ann. 558; 15 La. 527; 8 La. 231; 2 La. 303; 2 La. N. S. 475; 8 La. Ann. 431; 1 La. Ann. 171; 2 La. Ann. 562. Plaintiffs introduced in evidence, also, the statute laws of Ohio, showing that the money sued for, if recovered, was the statutory separate estate of the said Mary Ann King. This being all the evidence, the court thereupon gave judgment for the plaintiffs;” to which ruling and judgment the defendants excepted.

The refusal of a trial by jury, the several rulings of the court on the evidence, and the judgment of the court, are now assigned as error.

H. PILLANS, and OVERALL & BESTOR, for appellants.—(1.) The right to a trial by jury is a valuable constitutional privilege, which can not be denied or abridged, except on the clearest legal grounds.—*Stedham v. Stedham*, 32 Ala. 525; *United States v. Rathbone*, 2 Paine, C. C. 578. By the words of the statute (Code, § 3029), a trial by jury may be waived, “whenever the parties, or their attorneys of record, file a stipulation in writing” to that effect; but this statute must receive a strict construction. An agreement waiving a trial by jury, as in this case, is a mere incident of the particular trial, like an agreement as to the testimony of an absent witness; and has fulfilled its purpose when that trial is at an end. Particularly must this be the case, when a new party is afterwards introduced by amendment, who certainly would not be bound by such prior waiver.—*Benbow v. Robbins*, 72 N. C. 422; *Gage v. Nat. Bank*, 86 Illinois, 371. (2.) The transcript offered in evidence contained manifest erasures and alterations, in handwriting and ink different from the body of the record; and these ought to have been explained, before the record was admitted in evidence.—1 Greenl. Ev. § 564, 13th ed.; *Connally v. Spragins*, 66 Ala. 258; *Newcomb v. Presbrey*, 8 Metc. 406. (3.) The decree of the Louisiana court,

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annulling the probate of Martin's will, was not admissible evidence against the defendants here, who were not before the court as parties, not having appeared, and not having been served with process.—*Pennoyer v. Neff*, 5 Otto, 714; *Boswell v. Otis*, 9 How. U. S. 336. That such a proceeding is not *in rem*, was expressly decided in *Gaines v. Fuentes*, 2 Otto, 10-20.

FAITH & CLOUD, *contra*.—(1.) The court properly enforced the written agreement waiving a trial by jury.—*Sawyer v. Paterson*, 12 Ala. 275; *Baird v. Mayor*, 74 N. Y. 382; *Bamberger v. Terry*, 13 Otto, 40; *Supervisors v. Kennicott*, 13 Otto, 554; *Kearney v. Case*, 12 Wallace, 275; *Phillips v. Moore*, 10 Otto, 208; *Bruner v. Marcum*, 50 Mo. 405. (2.) As to the admission of the transcript as evidence, the former decision in this case is conclusive.—*King v. Martin*, 67 Ala. 177. The alteration of a date explains itself, and makes the record consistent. If the transcript was not correct, the error should have been shown by the production of another, duly authenticated. *Carroll v. Pathkiller*, 3 Porter, 279. That the transcript was *prima facie* correct, see *Woodbridge v. Austin*, 4 Amer. Dec. 740. (3.) In the proceeding to annul the probate of the will, the defendants were represented by a *curator* appointed by the court, according to the law of Louisiana; and they are concluded by the decree.—La. Civil Code, Art. 50-57, 1204-1213; *David v. Cabouret*, 1 La. Ann. 171; *Tarleton & Pollard v. Johnson*, 25 Ala. 311; *Hunt v. Acre*, 28 Ala. 580; 2 Brick. Digest, 148, § 236. (4.) The judgment of the court is not revisable.—*Norris v. Jackson*, 9 Wallace, 125.

SOMERVILLE, J.—The right of trial by jury is a constitutional one, secured by the fundamental law in all cases, civil as well as criminal.—Const. 1875, Art. I, § 12. It is a right, however, in the nature of a privilege, and may be waived in certain cases authorized by law. The statutes of this State provide, that “an issue of fact in a civil case, in a court of common-law jurisdiction, may be tried and determined by the court, without the intervention of the jury, whenever the parties, or their attorneys of record, file a stipulation in writing with the clerk of the court, *waiving a jury*.”—Code of 1876, § 3029.

Upon the first trial of this cause, in the court below, the attorneys entered into such a written stipulation, and the trial had was accordingly without the intervention of a jury. The only plaintiff to the suit, at that time, was Mary Ann King, one of the present appellees. Upon reversal of the cause in this court, her husband, Henry W. King, was joined as co-

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plaintiff with her upon the second trial. The question is, whether the defendants in the *second trial* are bound by the agreement to waive a jury, entered into upon the first trial. It is our judgment, that they are not concluded by such waiver. The agreement, being one in abrogation of a valuable constitutional privilege, must, for this reason, be strictly construed. It would require a most liberal and enlarged construction, to extend its operation beyond the particular trial apparently contemplated by it. It may be that litigants would be willing for the particular judge who presides at one trial to act as both judge and jury, and be entirely unwilling to risk his successor who might sit in judgment upon their rights at a subsequent trial. The parties to the suit, moreover, are not identical with those to the agreement. The first suit was one by the wife alone. The second, or present suit, has by amendment become one by both the husband and wife. The new party introduced is certainly not bound by it; and being without reciprocity, it would be inequitable to construe it to be only unilaterally obligatory. It required, in our opinion, a new agreement to debar the appellants of their right of trial by jury, and the court erred in not so ruling.—*Benbow v. Robbins*, 63 N. C. 422.

It is objected, that the transcript of the proceedings of the Louisiana court was improperly admitted in evidence, because of certain appearances indicating the alteration in two parts of the record of the date of the testator's will, changing it from November 18th, 1875, to the same date in 1873. It is true that, if an instrument, or record, presents the appearance of having been altered, and any ground of suspicion is presented, either by an inspection of it, or by extrinsic evidence, the party proposing to offer it in evidence is required first to remove the suspicion, by accounting for the alteration. But, where the alteration bears no such ear-mark of fraudulent intent, it will be presumed to have been made contemporaneously with the execution of the instrument, or the making of the record. Such, at least, seems to be the better doctrine, being based upon the more charitable maxim, that the law never presumes a fraud.—1 Greenl. Ev. § 564; *Crabtree v. Clark*, 7 Shep. 337; *Bailey v. Taylor*, 11 Conn. 531.

The correction of the date of the will in question presents no semblance of wrongful intent. So far from being suspicious in its nature, it but renders the record the more harmonious in its various parts, and rescues it from the imputation of both inconsistency and absurdity. When the cause was last before us, we observed, on an objection taken to a misdescription in the date of the will, as follows: "The pleadings all clearly show the purpose of the suit. The will is set out *in hæc verba*, and is described as dated November 18, 1873. The

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subsequent misdescription, in the judgment of the court, of the *year* in which the will was executed, stating it to be 1875, instead of 1873, is a *clerical error* manifest on the face of the proceedings, and is rendered more plain and certain, if possible, by the established fact, apparent from the record, that the testator died prior to the year 1875."—*King v. Martin*, 67 Ala. 181. As we then said, such a record may be said to correct itself, and we so construe it.

It is not denied that the proceeding in Louisiana, by which the will of the decedent, John Martin, was probated, was a proceeding in the nature of one *in rem*: yet it is insisted that the petition to revoke the probate was a suit *inter partes*, because the appellants had come into possession of property under the will. A judgment *in rem* has, among many other definitions, been said to be, "an adjudication upon the *status* of some particular subject-matter, by a tribunal having competent authority for that purpose;" or, in other words, "a solemn declaration proceeding from an accredited quarter, concerning the *status* of the thing adjudicated upon, which very declaration operates accordingly upon the *status* of the thing adjudicated upon, and, *ipso facto*, renders it such as it is thereby declared to be."—2 Smith's Lead. Cases, pp. 585-6; Freeman Judg. § 606. In such cases, the only practicable service as to non-residents must be constructive notice, the whole doctrine of which is the creature of necessity. Without its aid, the arm of every court would be paralyzed in its efforts to do justice, by the simple election of litigants to evade its process by becoming fugitives from its territorial jurisdiction. There is nothing unreasonable in the view, that one who acquires property under the terms of a probated will, takes it subject to the right of the court, which established its probate, likewise to revoke it, if adjudged to be founded in error, fraud or mistake. The *status* of the *res*, in such event, must necessarily be determined by the local jurisdiction which had authority over the subject-matter. The court in Louisiana possessed the same authority to revoke the probate of the will, as to establish it. Constructive service was all that could be given, in view of the non-residence of the defendants in the proceeding. If the *forum rei sitæ* proceeded according to its own laws governing such notice, it is all that we can require. This seems to have been done in the appointment of a *curator ad hoc*, to appear and represent the interests of the non-resident litigants, according to the practice of the civil law, which is a substitute, as we take it, for our method of publication.—Cooley's Const. Lim. 499-500; Freeman on Judg. §§ 606, 607, 608, 612; 2 Brick. Dig. 159, §§ 38, *et seq.*; *Kumpe v. Coons*, 63 Ala. 448.

For the error of the Circuit Court in refusing the appellant's
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demand for a jury trial, the judgment must be reversed, and the cause remanded, although in other respects its rulings are, in our opinion, entirely free from error.

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Bill in Equity to have Absolute Deed declared Mortgage, and for Redemption and Account.

1. *When absolute deed will be declared mortgage.*—In a court of equity, a conveyance of lands, absolute and unconditional on its face, will be declared and established as a mortgage, on clear and certain proof that the parties intended it should stand simply as a security for a debt: and this fact may be proved by parol evidence, or may be shown by a separate writing.

2. *Whether transaction is mortgage, or conditional sale.*—When the conveyance is absolute on its face, and the controversy is whether it was intended as a mortgage or an unconditional sale, the party asserting that it was intended as a mortgage must show, by clear and convincing evidence, that it was so understood and intended by the parties at the time of the original transaction; but, when it is admitted that the transaction was not, as the conveyance on its face imports, an absolute and unconditional sale, and it is doubtful whether it was intended as a mortgage or as a conditional sale, the court is inclined to consider and treat it as a mortgage.

3. *Same.*—The court states the tests of controlling importance in such cases, as laid down in former decisions, and declares the transaction in this case, when subjected to these tests, to have been intended as a mortgage, and not as a conditional sale.

4. *Protection extended to bona fide purchaser without notice.*—A purchaser in good faith, and for valuable consideration, of lands chargeable with an outstanding equity, of which he had no notice until after he had paid the purchase-money, will be protected against it in a court of equity.

5. *Mortgagee's liability for rents and profits.*—A mortgagee in possession, and in the perception of rents and profits, is held accountable for them as a trustee; and this principle is here applied against the grantee in an absolute conveyance, which is declared and established as a mortgage only, after he had sold and conveyed to a *bona fide* purchaser for valuable consideration without notice.

APPEAL from the Chancery Court of Butler.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on 11th August, 1881, by Mrs. Mary E. Turner, against W. W. Wilkinson, Benjamin F. Kilgore, and John F. Barganier; and sought to have a deed for a tract of land executed by the complainant to said Wilkinson, which was absolute on its face, declared to be a mortgage, and for a redemption and account under it. A copy of the conveyance was not made an exhibit to the bill, and it was alleged

72	361
96	379
72	361
101	422
72	361
108	545
72	361
111	624
72	361
132	618
72	361
126	148
72	361
137	331
137	332

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that it had never been recorded; that it was executed in April, 1877, was intended only as a mortgage, and was given to secure the re-payment of \$575, money advanced by said Wilkinson, for complainant, to one D. G. Dunklin, to effect a redemption of the land from sale under a former mortgage to said Dunklin, which had been foreclosed. The bill alleged, also, that the transactions with Dunklin were conducted, on the part of the complainant, by said Wilkinson and her father, as her agent, and that the instrument which she signed was represented to her to be a mortgage, and was so intended; that she afterwards discovered that Wilkinson, instead of taking a conveyance from Dunklin to her, had taken a conveyance directly to himself; that he entered into the possession of the land soon afterwards, and continued in the possession, taking the rents and profits to his own use, until he sold a portion of the land to said John F. Barganier, and another portion to said Benjamin F. Kilgore, both of whom had notice of the complainant's asserted rights. On these allegations, the complainant prayed that an account might be taken of the debt due from her to said Wilkinson, and of the rents and profits with which the defendants were respectively liable; that the deed from Dunklin to Wilkinson be declared fraudulent and void, and be cancelled; that the complainant be permitted to pay Wilkinson any balance that might be found due to him; that the mortgage to him, or conveyance intended as a mortgage, be satisfied and discharged, and the legal title to the lands be vested in the complainant by the decree of the court.

An answer to the bill was filed by Wilkinson, denying that the conveyance from the complainant to him was intended as a mortgage, and alleging that the facts were these: that the complainant applied to him, before the expiration of two years from the mortgage sale at which Dunklin had bought the lands, for a loan of money to enable her to redeem from Dunklin, but he refused to lend or advance the money; that afterwards, more than two years from the sale having expired, being annoyed with the persistent importunities of the complainant and her father, he finally agreed to buy the land from Dunklin, at the price which he was willing to take, and to allow the complainant a further time to redeem it; that he did effect this arrangement, paid the money to Dunklin (\$575), and took from him an absolute conveyance of the land; that he also agreed to let the complainant redeem the land at any time prior to March 1st, 1878, "and, to secure himself from any annoyance if she saw fit not to redeem, complainant also executed to him her deed of conveyance, with covenants of warranty, as will appear in evidence on the trial of this cause." He alleged that the complainant had never offered to redeem the land within

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the time agreed on, and insisted that she had lost all right of redemption, and that he held the land absolutely, free from any right or claim of redemption, as Dunklin held it at the time he sold and conveyed to respondent. Answers were also filed by Kilgore and Barganier, each claiming to be a purchaser for valuable consideration without notice.

On final hearing, on pleadings and proof, the chancellor held that the complainant was not entitled to any relief, and therefore dismissed her bill; and his decree is now assigned as error.

BUELL & LANE, and J. F. STALLINGS, for appellant.—As to the material facts in this case, there is no conflict in the evidence; and the only question is, whether the transaction between the parties was intended as a mortgage, or as a conditional sale. It is conclusively shown that the transactions commenced in an application for the loan of money; that the money was loaned, or advanced to Dunklin, for the complainant, to give her a longer time to redeem her land; that the conveyances were intended as security to Wilkinson for the money so loaned or advanced; and that the land was worth at least three times the sum advanced. These facts are all recognized *indicia* of a mortgage, and, when they concur, make out a very strong case.—*Williamson v. Culpepper*, 16 Ala. 211; *Locke v. Palmer*, 26 Ala. 362; *Turnipseed v. Cunningham*, 16 Ala. 501; *Crews v. Threadgill*, 35 Ala. 334; *Parish v. Gates*, 29 Ala. 254; *Eiland v. Radford*, 7 Ala. 724; *Hudson v. Isbell*, 5 Stew. & P. 67; *English v. Lane*, 1 Porter, 32; 47 Mo. 543; 65 N. C. 520; 15 Minn. 69; 59 Barbour, 651. If the evidence leaves it doubtful whether a mortgage or a conditional sale was intended, the court inclines to construe and treat it as a mortgage.—*Locke v. Palmer*, 26 Ala. 312; *McNeill v. Norworthy*, 39 Ala. 156. Another fact is proved, which is irreconcilable with the idea of a conditional sale, and shows conclusively that the transaction was intended as a mortgage: the fact that complainant delivered between two and three bales of rent cotton, to Wilkinson or his agent, in payment of interest on the loan for the first year. This shows that there was a debt, recognized and existing; and it was entirely unnecessary that there should be a note, or other written evidence of it, when the defendant held the legal title to the property as security. Kilgore fails to make out the defense of a *bona fide* purchaser for value without notice.—*Wells v. Morrow*, 38 Ala. 125; *Jewett v. Palmer*, 7 Johns. Ch. 68; *Wormley v. Wormley*, 8 Wheaton, 449. If the defense of Barganier is made out, then Wilkinson becomes liable for the purchase-

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money received from him, with interest, and must apply it in reduction of the mortgage debt.

J. C. RICHARDSON, JOHN GAMBLE, and WATTS & SONS, *contra*. To sustain a bill like this, which seeks to change the character of an instrument under seal by parol evidence, the proof must be clear, consistent, and convincing, leaving no room for doubt or uncertainty.—*West v. Hendrix*, 28 Ala. 235; *Phillips v. Croft*, 42 Ala. 477; *Brantley v. West*, 27 Ala. 552; *Sewell v. Price*, 32 Ala. 98; *Harris v. Miller*, 30 Ala. 224; *Chapman v. Hughes*, 14 Ala. 220; *Robinson v. Farrelly*, 16 Ala. 477; *B. & L. Asso. v. Robertson*, 65 Ala. 386. Here, instead of this full measure of proof, the evidence is weak, meagre, and unsatisfactory. The conveyance is absolute on its face; and while the complainant swears that it was represented to her to be a mortgage, and was so intended by her, she does not state by whom the representation was made, nor prove that it was in fact made by any person; while the defendant denies that a mortgage was intended by him, and claims that it was “a straight-out purchase,” with an agreement to let the complainant re-purchase within a specified time; and Harris, his agent, corroborates his statements. To establish the instrument as a mortgage, there must be the concurring intention of both parties at the time the transaction is entered into; and this certainly is not proved, when it is simply alleged by one party, and contradicted, in terms more full and explicit, by the other. Without an existing debt, there could be no mortgage; and can the court say, on the facts proved, that if the defendant should seek to establish and foreclose his conveyance as a mortgage, and the property should bring less than the amount paid by him, with interest, he could have a personal decree against the complainant for the balance? It is submitted that, on the facts proved, the transaction was a conditional sale, and not a mortgage.—Authorities above cited; also, *Jones on Mortgages*, § 256; *Conway v. Alexander*, 7 Cranch, 218; *McKinstry v. Conly*, 12 Ala. 678; *Flagg v. Mann*, 14 Pick. 467. This court will not, in any case, reverse the chancellor’s decision on a question of fact, unless clearly convinced that he erred. *Rather v. Young*, 56 Ala. 94; *Bryan v. Hendrix*, 57 Ala. 387.

BRICKELL, C. J.—The purpose of the original bill, filed by the appellant, is the redemption of certain lands, which it is averred she conveyed by way of mortgage to the appellee, Wilkinson, as a security for the repayment of money borrowed. The conveyance to Wilkinson is, in form and terms, absolute and unconditional.

In a court of equity, the character of the conveyance must
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be determined by the clear and certain intention of the parties; and if there be an agreement between them, that it shall operate as a security for a debt, it can and will operate only as a mortgage. The agreement may be expressed in the deed, or in a separate writing, or it may rest in parol; for it is now well settled, that, in equity, parol evidence is admissible to convert into a mortgage an instrument appearing on its face to be an absolute conveyance.—2 Brick. Dig. 271, § 316; *M. B. & L. Asso. v. Robertson*, 65 Ala. 472. When the conveyance is absolute, and the controversy is, whether the parties contemplated an unconditional sale or a mortgage, the party claiming that it was intended as a mortgage, if the fact is denied, must show by clear and convincing evidence that, at the time of the original transaction, it was intended and understood by both parties the conveyance should operate only as a security for a debt. 2 Brick. Digest, 271, §§ 318–22. But, when it is an admitted fact, that the transaction was not an absolute, unconditional sale, as the conveyance imports, and the controversy is, whether a mere mortgage or a conditional sale was intended, a court of equity is inclined to consider the transaction as a mortgage. For, by this construction, complete justice can be done to both parties; the mortgagee is secured in the payment of the money he may have loaned or advanced, with its accruing interest, and the mortgagor is protected in his equity of redemption; while, if the other construction was adopted, the time limited for the re-purchase must be precisely observed, or the right to reclaim the property is irretrievably lost; oppression could be exercised over the needy, and undue advantage taken of their distressed or embarrassed circumstances.—*Turnipseed v. Cunningham*, 16 Ala. 501; *Locke v. Palmer*, 26 Ala. 312; *Parish v. Gates*, 29 Ala. 254; *Crews v. Threadgill*, 35 Ala. 334; *McNeill v. Norsworthy*, 39 Ala. 156.

It is not pretended, in the present case, that the transaction between the parties was, as the conveyance on its face expresses, an absolute, unconditional sale. It is an admitted fact, that there was a contemporaneous agreement, subjecting the conveyance to conditions or trusts not expressed upon its face. The point of contention is, whether a mortgage or a conditional sale was intended. The lands had been sold under a mortgage executed by the appellant, and purchased by Dunklin. The statutory period of redemption had expired, but Dunklin gave to the appellant the privilege of redeeming notwithstanding that fact, upon the same terms and conditions on which she could have been let in to redeem, if within due time she had asserted her rights. The amount of money necessary to effect the redemption was agreed upon and settled between the appellant and Dunklin. There had been negotiations between

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the appellant and Wilkinson, resulting in his furnishing the money to pay Dunklin; and it was paid to him by Harris, Wilkinson's clerk and agent. Dunklin executed to the appellant a quit-claim conveyance, and she executed to Wilkinson the conveyance now in question, and he gave to her a writing showing the agreement between them. The writing is not produced, and the only account of its absence is that given by the appellant (which is not denied); that at the request of Harris, the agent and clerk of Wilkinson, who seems to have taken an active part in all the transactions, she sent it to him, that Wilkinson might indorse upon it an enlargement of the time for redemption, but it was never returned to her. Parol evidence of its contents was introduced by both parties, without objection. The appellant states that she was to have two years to redeem the lands, paying the money advanced to Dunklin, in two equal installments. Harris states that she was to have until the fall of 1878 (a few months less than two years), to redeem; and that he has no recollection that she was to be forever barred, if within that period she did not redeem. Wilkinson does not state any thing in reference to this writing, further than a general denial that the conveyance to him was to be regarded as a mortgage. This is all the evidence in reference to the transaction, and it will be seen that it is very meagre, and not very satisfactory. There is, however, no material conflict between the appellant and Harris; they concur in the fact, that the appellant had a right to redeem upon the re-payment of the money advanced by Wilkinson. Whether by *redemption* the parties intended *re-purchase*, is matter of inference to be drawn from all the facts and circumstances.

Although it is difficult to establish fixed rules, by which to determine whether a particular transaction is a mortgage, or a conditional sale, there are some facts which are regarded as of controlling importance in determining the question. Did the relation of debtor and creditor exist, before and at the time of the transaction? or, if not, did the transaction commence in a negotiation for a loan of money? Was there great disparity between the value of the property, and the consideration passing for it? Is there a debt continuing, for the payment of which the vendor is liable? If any one of these facts is found to exist, in a doubtful case, it will go far to show a mortgage was intended. If all of them are found concurring, the transaction will be regarded as a mortgage, rather than a conditional sale, unless the purchaser, by clear and convincing evidence, removes the presumptions arising from them.—*Eiland v. Radford*, 7 Ala. 724; *Robinson v. Farrelly*, 16 Ala. 472; *Locke v. Palmer*, 26 Ala. 312; *Crews v. Threadgill*, 35 Ala. 334; *M. B. & L. Asso. v. Robertson*, 65 Ala. 382. All these *indicia*

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of a mortgage are shown in the present case. The parties were first brought into relationship by a negotiation for a loan of money—there was no proposition to buy, or to sell the lands; for, at the time when the negotiations commenced, the appellant had in them no alienable interest. The money advanced was but little more, if so much, as one-third of the value of the lands. There was no note or memorandum given for the payment of the money advanced to appellant, and that is always a circumstance which tends to show that a mortgage was not intended; for, generally, when there is no debt, there is no mortgage, and when there is a debt, there can not be a conditional sale. But, that no evidence in writing of the debt is taken, is only a circumstance—it is not conclusive.—*Robinson v. Farrelly*, 16 Ala. 472; *Turnipseed v. Cunningham*, *Ib.* 501; *M. B. & L. Assn. v. Robertson*, 65 Ala. 382. The value and weight of it as a circumstance depends upon all the facts and circumstances with which it is connected. The debt may exist, and may be capable of proof, though a bond, covenant, or note for its payment is not given; and in this case, the transaction originating in a loan of money, the evidence of the loan proves the debt. It was known to Wilkinson, that the appellant was not of ability to pay the money advanced, otherwise than from the lands; and of these he had an absolute conveyance. Obviously, it would seem to the parties a rather useless ceremony, that a memorandum in writing of the debt should be given, when in his own hands, and under his own control, Wilkinson had all the property of the appellant which could be subjected to its payment. If we concede that the least which may be said, in view of all the evidence, is, that there may be a doubt whether a mortgage or a conditional sale was intended, the doubt must be resolved in favor of the appellant, rather than to suffer her creditor to gain the unjust advantage of acquiring her lands for much less than their real value; an advantage, it may be remarked, he could not have gained, if he had dealt directly with Dunklin, who, upon the same consideration, would not have parted with the lands to any one else than the appellant.

A *bona fide* purchaser, upon a valuable consideration, of lands chargeable with an outstanding equity, of which he has no notice until after the payment of the purchase-money, a court of equity favors and protects, and will not divest him of the legal estate, or enforce the equity against him. It is in this relation, the appellee, Barganier, stands. He purchased from Wilkinson, upon a fair and valuable consideration, paying in full the purchase-money, and receiving a conveyance of the legal estate, without notice of the equity of the appellant. But, while protection is afforded to him, Wilkinson must account for the purchase-money received from him, and the accruing in-

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terest. He must also be charged with all rents received by him. A mortgagee in possession, and in the perception of rents and profits, must account for them as a trustee.—*Powell v. Williams*, 14 Ala. 476; *Morrow v. Turney*, 35 Ala. 131.

The result is, the chancellor erred in decreeing the transaction was a conditional sale, and not a mortgage. The decree must be reversed, and a decree here rendered in conformity to this opinion.

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Special Action on the Case for Damages, against Purchaser of Crop with Notice of Lien.

72	368
100	436
72	368
119	157
72	368
119	541
72	368
128	423

1. *Conclusiveness of judgment as bar to another suit.*—The rule of *res adjudicata*, or former recovery, is confined to those cases in which the parties are the same, the subject-matter the same, the identical point directly in issue in each, and the judgment in the first suit rendered on that point; and it is essential, also, that the former judgment was rendered on the merits of the case.

2. *Same; what is decision on merits; misjoinder and nonjoinder.*—It is not always easy to determine what issues may be considered as involving the merits of the case; but it seems to be generally conceded, that when the suit is defeated on the single ground of a misjoinder or nonjoinder of parties plaintiff, the judgment is not a decision on the merits, and is not a bar to another suit.

3. *Same.*—An action by husband and wife as joint plaintiffs, to recover damages for the conversion of property belonging to the wife's equitable estate, which had been reduced to possession, having been defeated on the ground that there was a misjoinder of parties plaintiff, the judgment is not a bar to a subsequent action by the husband alone, suing as trustee; though, *it seems*, if the first action had proceeded to judgment on the merits, the question of misjoinder not being raised, the judgment would be a bar to the second action.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. JOHN MOORE.

This action was brought by Tristram B. McCall, "as husband and trustee of Laura A. McCall, his wife," against John W. Jones; and was commenced on the 1st June, 1882. The complaint contained only a single count, claiming two hundred dollars as damages, "for this: that (to-wit) on 1st December, 1881, defendant received and took from one Peter Patton about eighty bushels of corn, and about three hundred pounds of seed-cotton, worth, to-wit, one hundred dollars; on which said corn and cotton, plaintiff avers that said Laura A. McCall, who is plaintiff's wife, had, at the time the same was so taken, a lien for money,

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provisions, and necessary teams to make a crop, which plaintiff, as such trustee, avers were advanced by said Laura A. McCall as landlord, to said Peter Patton, to enable him, said Patton, to make a crop on land rented by him from said Laura A. McCall in 1881; and plaintiff, as trustee as aforesaid, avers that said Laura A. rented to said Patton, for the year 1881, to-wit, thirty acres of land, which plaintiff avers was and is a part of the equitable separate estate of the said Laura A.; and plaintiff, as such trustee, avers that said advances were made to said Patton for the sustenance and well-being of said Patton or his family, or for preparing said rented land for cultivation, or for cultivating, gathering, saving or handling the crop grown on said rented land for market; and plaintiff further avers, that said cotton and corn, so taken and received by the defendant, was raised on said land so rented by said Patton from said Laura A. McCall in the year 1881; and that plaintiff, as husband and trustee of said Laura A., had a lien thereon for said advances; and that said defendant, well knowing that said sum for advances was so due to plaintiff as husband and trustee of said Laura, and that plaintiff had a lien therefor on said corn and cotton, took and received said corn and cotton, and converted the same to his own use, thereby depriving plaintiff, as husband and trustee of said Laura A., thereof; to their great damage, two hundred dollars. And plaintiff further avers, that said advances due by said Patton were and are part of the equitable separate estate of the said Laura A., who is a married woman, and is the wife of plaintiff; and he sues as husband and trustee of his said wife."

The defendant filed a special plea in bar, as follows: That on the 9th December, 1881, said Laura A. McCall, the identical person who is named in the present suit, caused to be sued out of this court against the said John W. Jones, the defendant in the present suit, a summons and complaint, a copy of which is hereto attached as a part of this plea, marked *Exhibit A*; which said summons and complaint were duly served on this defendant; and afterwards, at the last term of this court, said cause coming on to be tried, and both parties having announced themselves ready, the plaintiff moved the court to amend the said summons and complaint by making T. B. McCall a party plaintiff, and by striking out of the complaint then before the court the averment that the damages sued for are the separate statutory estate of the said Laura A. McCall; which motion was allowed by the court, and said amendment was made; and afterwards, on the same day, the parties in said cause thereupon came, and the defendant pleaded not guilty to said complaint, and the parties joined issue on said plea, and the cause was tried by a jury, who rendered a verdict in favor of the defendant in said cause; and thereupon the court rendered judgment on said verdict, in

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favor of the defendant, that he go hence, &c. ; all of which will more fully appear by a copy of said judgment-entry, hereto attached as a part of this plea, marked *Exhibit B* ; which said judgment remains of record in full force, not reversed, nor set aside. And the defendant avers, that the said T. B. McCall, named as plaintiff in said former suit, is the same person who is the plaintiff in the present suit ; that the causes of action in said former suit are the same identical causes of action mentioned in the summons and complaint in the present suit, and none other ; that the lien sought to be enforced in the present suit, and the conversion alleged in the present suit, are the same identical lien and the same conversion mentioned and alleged in said former suit, &c.

The complaint in the former action, as set out in the exhibit to the plea, is entitled "*Laura A. McCall*, plaintiff, v. *John W. Jones*, defendant," and in these words : "The plaintiff claims of the defendant two hundred dollars damages, for that, to-wit, on 1st December, 1881, defendant received and took from one Peter Patton eighty bushels of corn, and, to-wit, about three hundred pounds of seed-cotton, worth, to-wit, one hundred dollars ; on which cotton and corn, plaintiff avers that she then had, at the time the same was so taken, a lien for advances in necessary teams and provisions, which plaintiff avers were made by her as landlord to said Patton to make a crop in 1881 ; and plaintiff avers that she rented, to-wit, thirty acres of land to said Patton for the year 1881, and advanced to him in teams and provisions, to-wit, two hundred dollars ; and that said corn and cotton was raised on said land so rented by plaintiff to said Patton ; and that said advances being due, and said defendant knowing the same was due, and knowing that plaintiff had a lien thereon for said advances, received the same, and converted the same to his own use, thereby depriving plaintiff thereof ; to plaintiff's damage, two hundred dollars. Plaintiff avers, that said advances due by said Patton are her statutory separate estate under the laws of Alabama, she being a married woman."

The judgment-entry, as shown by the exhibit, was as follows : "Came the parties, by their attorneys, and the plaintiff moves the court to amend the summons and complaint, by making T. B. McCall a party plaintiff, and by striking out of the complaint the averment that the damages sued for are the separate statutory estate of the said *Laura A. McCall* ; which motion is granted. Thereupon came a jury," &c., "who, being impanelled and sworn according to law well and truly to try the issue joined between the parties, on their oaths say, 'we, the jury, find for the defendant.' It is therefore considered by the court, that the defendant go hence," &c.

There was a demurrer to this plea, which the court overruled,
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and the plaintiff then filed three replications to it; the first alleging, that the verdict and judgment in the former action "was rendered upon the sole question, whether the parties plaintiff in said suit could maintain said suit, the testimony showing that the property injured was the equitable separate estate of the said Laura McCall, and no other question was involved or decided in said suit;" the second, that the instrument produced and read in evidence on the trial of the former suit, as showing the plaintiff's title, showed that Mrs. McCall's estate in the property was an equitable separate estate, and thereupon the court charged the jury that the plaintiffs could not recover in that action, and the jury returned a verdict for the defendant, and no other issue was involved or decided; and the third, that the only issue involved or tried in the former suit was the right of the plaintiffs, under the amended complaint, to recover for the conversion of the property shown by the evidence to belong to the equitable separate estate of Mrs. McCall; and that the court having excluded from the jury, as evidence, the deed under which she claimed the property, and which was set out in the replication, "plaintiffs thereupon refused to proceed further, and thereupon the jury rendered the verdict set up in said plea, and no other evidence was submitted to said jury, and no other issue was submitted to them, or tried by them." The court sustained a demurrer to each of these replications; and issue being joined on the plea, allowed the record of the former judgment to go to the jury as evidence supporting it; to which ruling an exception was reserved by the plaintiff.

The rulings of the court on the pleadings, and the admission of the record as evidence, are now assigned as error.

R. M. WILLIAMSON, and COOK & ENOCHS, for appellant, cited *Pickens v. Oliver*, 29 Ala. 528; *Bolling v. Mock*, 35 Ala. 727; *Holley v. Flournoy*, 54 Ala. 99; *Bigelow v. Winsor*, 1 Gray, Mass. 299; *Benz v. Hines*, 3 Kan. 397; Freeman on Judgments, 252.

WATTS & SONS, *contra*, cited *O'Neal v. Brown*, 21 Ala. 282; *Michan and Wife v. Wyatt*, 21 Ala. 813; *Lewis v. Waring*, 53 Ala. 618.

SOMERVILLE, J.—The rule of *res adjudicata*, or former recovery, is confined to those cases where the *parties* to the two suits are the same, the *subject-matter* the same, the *identical point* is directly in issue, and the *judgment has been rendered in the first suit on that point*.—*Gilbreath v. Jones*, 66 Ala. 129; 2 Smith's Lead. Cases, 609 [573]; Freeman on Judg. § 258. It is not only essential that the issue, or point in question, must

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either have been *actually decided*, or *necessarily involved* in the first case, but the first judgment, sought to be pleaded in bar in the second suit, will not be available as a defense, unless it was a judgment on *the merits of the case*.—*McDonald v. Mobile Life Ins. Co.*, 65 Ala. 358; *Freeman on Judg.* § 460; 1 *Greenl. Ev.* § 528; *Hutchinson v. Dearing*, 20 Ala. 798. And it is, furthermore, now settled, that if the issue in the first trial was broad enough to cover that in the second, extrinsic or parol evidence, which is not contradictory of the record, is admissible to show that the matters involved or decided were the same.—*Chamberlain v. Gaillard*, 26 Ala. 504; *Wells' Res Adj.* 252, § 297; *Freeman on Jqdg.* §§ 260-263.

As to what issues may be considered as involving the merits of a case, it is not always easy to determine. But it seems generally to be conceded, that where a suit has been defeated for *non-joinder or misjoinder of parties plaintiff* before the court, a judgment rendered alone on this ground can not be considered as a decision on the merits.—*Freeman on Judg.* §§ 263, 266; 2 *Smith's Lead. Cases*, 673; *Wells' Res. Adj.* p. 15, § 19, p. 361, § 440, p. 384, § 455; *Vaughan v. O'Brien*, 57 *Barb. (N. Y.)* 491; *Hughes v. United States*, 4 *Wall.* 237; *Miller v. Maurice*, 6 *Hill*, 114; *Hill v. Huckabee*, 70 Ala. 183.

It is evident that, in view of this principle, the court erred in ruling that the judgment rendered in the first suit was a bar to the present action. The first suit was brought by the wife, Mrs. Laura McCall, alone, but was amended so as to join, as a co-plaintiff, her husband, Tristram B. McCall, who sues as sole plaintiff in the present action. We thus had the case presented, of husband and wife suing at law, as joint parties plaintiff, for what the evidence disclosed to be the wife's equitable separate estate, which had been previously reduced to possession. It is clear, therefore, that the first suit could only have been instituted by the husband in his own name alone, and that the wife was improperly joined with him.—*Pickens v. Oliver*, 29 Ala. 528; *Gerald v. McKenzie*, 27 Ala. 166. The fact is clearly averred in the pleadings, and is admitted by appellee's demurrer, that the cause went off upon the point, expressly adjudged by the court, that the husband and wife could not *jointly* maintain such an action. The issue decided, therefore, was one of misjoinder of parties plaintiff, involving their capacity to sue, rather than the non-existence of a meritorious cause of action in behalf of a proper plaintiff. Although the husband may have had, on the merits of the case, a good cause of action, fully sustained by the evidence; yet the action must, of necessity, have failed, because of the rule that, where several persons sue jointly as plaintiffs, they must show a joint cause of action against the defendant, and all must recover or none can

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do so.—*McLeod v. McLeod*, at present term; *James v. James*, 55 Ala. 520; *Hardeman v. Sims*, 3 Ala. 747.

There are no two opinions about the legal proposition, that the *same issue must be presented* in both suits, in order that there should be a bar, or else the former adjudication can not be conclusive between the litigants.—Wells' *Res Adj.* 240, § 282; *Beadle v. Graham's Adm'r*, 66 Ala. 99. The question in this suit is not one of the misjoinder of proper parties plaintiff—the point upon which it was adjudged that the plaintiff in the first action must fail. The husband sues alone, as the trustee of the wife, for her equitable separate estate, which had already been reduced to possession, the contract creating it appointing no special trustee; and there can be no doubt of his capacity to maintain the suit in his own name.—*Pickens v. Oliver*, 29 Ala. 528. The same issue not being presented in both suits, and the first suit having been decided for misjoinder of parties plaintiff—a technicality not going to the merits of the case—the judgment pleaded in bar of this action is not conclusive by way of estoppel, and the doctrine of *res adjudicata* does not apply.

If the first action had been allowed to proceed to judgment, the parties being allowed to recover on the merits without raising the question of misjoinder, a different rule, for manifest reasons, might apply. Such was the case of *Hawkins v. Lambert*, 18 B. Monr. (Ky.) 106, where the wife, suing alone for her separate estate without objection, failed on the merits of the case, no question being raised as to parties. In a second suit by both husband and wife, for the same cause of action, the first judgment was held to be a bar.

The judgment must be reversed, and the cause remanded.

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Bill in Equity for Reformation of Conveyance of Land.

1. *Statute of limitations, and lapse of time, as bar to relief against mistake.*—The statute of limitations, or lapse of time, will bar equitable relief against mistake, as well as against fraud; the period of the bar being computed from the discovery of the mistake, or the time at which, by the exercise of reasonable diligence, it might have been discovered.

2. *Same.*—In this case, the complainant having been in the peaceable possession of the land intended to be conveyed, from the execution of the conveyance to him, in which the lands were incorrectly described, to the filing of his bill for the correction of the mistake, a period of more than twenty years, and having only recently learned the mistake, from

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the assertion of a hostile title and claim by a sub-purchaser from the personal representative of his deceased vendor,—the lapse of time was held no bar to the reformation of the deed.

3. *Correction of mistake by voluntary act of parties; when demand and refusal is necessary.*—A court of equity will not interpose to correct an innocent mistake, capable of full correction by the voluntary act of the parties, unless a demand and refusal to correct it is alleged and proved, or a reasonable excuse is shown for the failure to ask it; but, when the bill shows that the vendor or grantor is dead, and that his only heir is an infant, this excuses the failure to ask such correction, and justifies a resort to a court of equity.

APPEAL from the Chancery Court of Conecuh.

Heard before the Hon. JNO. A. FOSTER.

The record in this case does not show when the original bill was filed, but the subpoenas to answer were issued on the 22d June, 1832; and though an amended bill was also filed, it is nowhere set out, nor does the record show in what particulars the original bill was amended. The bill was filed by George P. Weaver, against the partners composing the firm of Harold Brothers & Scott, and against Jesse Howard, Mrs. Mary Reid, and John H. Jones; the latter being the grandson and only heir at law of Henry Sledge, deceased, and Mrs. Reid being the widow of said Sledge. The bill prayed the reformation of deeds for a tract of land, executed by the said Henry Sledge in his life-time, to the complainant and said Jesse Howard; also, the reformation of another deed, by which said Howard conveyed his interest in the land to the complainant, the cancellation of the conveyances under which Harold Brothers & Scott claimed the land, and an account against them for waste and damages.

The deeds executed by said Sledge and wife to the complainant and said Howard, copies of which were made exhibits to the bill, were each dated August 21st, 1855, and conveyed by quit-claim only, on the recited consideration of ten dollars in hand paid. In the conveyance to the complainant, the land was thus described: "All that part of the *south-west* fourth of the *north-east* quarter of section one (1), in township one (1), range ten (10), that lies west of the Conecuh river, and that the said party of the second part [George P. Weaver] has inclosed with a fence, containing seven acres more or less;" and the land conveyed to Howard was thus described in his deed: "All that part of the *south-west* fourth of the *north-east* quarter of section one (1)," same township and range, "that lies west of the Conecuh river, and that does not lie within the inclosure of George P. Weaver, containing twelve acres, more or less." The deed executed by said Howard and wife to the complainant, a copy of which was also made an exhibit to the bill, was dated September, 1879, and recited the payment of

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§65 as its consideration; the lands conveyed by it being described as the north-west quarter of the north-east quarter of said section one (1), "and all that part of the *south-west* quarter of the *north-east* quarter of said section one (1) that lies west of the Conecuh river, containing fifty-two (52) acres, more or less."

The bill alleged, that said Sledge never in fact claimed or owned any interest whatever in the *south-west* quarter of the *north-east* quarter of said section, and was not in possession of any part thereof; but that he sold, and intended to convey to complainant and said Howard, "the *north-west* quarter of the *south-east* quarter of said section, and put them in possession of said land;" that the lands were misdescribed by mistake in the deeds, and that the complainant himself then owned and was in possession of the forty-acre tract described in the deeds. It was alleged, also, that said Sledge put the complainant and Howard in possession of the lands sold and intended to be conveyed, "and your orator has continued in the possession of said land, through himself and said Howard, claiming said lands as his own, from said 21st August, 1855, to the present time, except as hereinafter shown;" that Sledge died in October, 1872, leaving a widow (Mrs. Mary Reid) and an only grandson (John H. Jones, who was still an infant when the bill was filed), as his heirs at law and distributees; that letters of administration on his estate were duly granted to his said widow, who gave bond and qualified, and in May, 1873, acting under authority of a special act of the General Assembly, approved April 23d, 1873, but without a compliance with its terms, she sold all the lands belonging to the estate, including therein by mistake the land previously sold to complainant and Howard; that one R. S. Smith became the purchaser at the sale, but it was never confirmed; that Smith afterwards sold and conveyed to one John Dixon, who sold and conveyed to E. B. Riley, since deceased, who sold and conveyed to Harold Brothers & Scott. It was alleged, also, "that at the time said deeds were executed, by Mary Sledge (now Reid) to R. S. Smith, by said Smith to John Dixon, and by said Dixon to E. B. Riley, your orator and said Howard were in the possession of said lands, and had been for more than twenty years, claiming them as their own, and had actually cleared up a portion of the said piece of land, and had well nigh worn it out by long and continued use; and said vendors or grantors of said land well knew that your orator was claiming said land as his own, and that he and those under whom he claims had been in the actual possession of said lands, claiming them as his own, and exercising acts of ownership, ever since August 21st, 1855; that said Riley, before he ever entered upon said lands, was notified by your orator of his

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claim and possession, and also of the claim and possession of said Jesse Howard, but notwithstanding he entered upon said lands, and built a mill thereon, and then conveyed to said Harold Brothers & Scott; and your orator fully notified said Harold Brothers & Scott, before their said purchase from said Riley, or pretended purchase, of his claim to said lands, and that he would institute appropriate proceedings to perfect his title to said lands." The several conveyances under which Harold Brothers & Scott entered are not set out, nor are their dates shown.

A demurrer to the bill was filed by Harold Brothers & Scott, assigning the following (with other) grounds of demurrer: 1st, "because said bill shows that more than twenty years have elapsed since the mistake that is sought to be corrected, and does not show when it was first discovered by complainant, nor that he commenced suit as soon as he could after the discovery of the mistake;" 2d, "because the bill shows that the complainant was fully aware of his rights in 1873, at the time of the purchase by R. S. Smith, and from thence on to the purchase by these defendants, and has yet remained inactive, taking no steps for the enforcement of his rights;" 3d, "because the complainant did not commence his suit within one year after the discovery of the alleged mistake;" 4th, "because the complainant has a complete and adequate remedy at law." The chancellor overruled the demurrer, and his decree is now assigned as error.

J. M. WHITEHEAD, for appellants.

JOHN GAMBLE, *contra*.

BRICKELL, C. J.—The argument in support of the demurrer is, that as more than twenty years elapsed after the making of the mistake in describing the lands, during which period the complainant and those under whom he claimed had uninterrupted possession of the lands it was intended to convey, the lapse of time is a bar to the reformation of the conveyance. There can be no doubt, that the statute of limitations, or the lapse of time, will operate in a court of equity to bar relief against mistake, as it will operate to bar relief against fraud; and that the period of the bar will be computed from the discovery of the mistake, or the time at which by the exercise of reasonable diligence it could have been discovered.—2 Story Eq. § 1521 *n*. And it may be admitted, that the long delay in applying for relief is not accounted for in the present case. It may be inferred from the bill, that the complainant was ignorant of, and did not discover the erroneous description of the

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lands, until a short time before the bill was filed. Mere general or inferential averments can not relieve from the consequences of long and unreasonable delay in the assertion of rights.—*James v. James*, 55 Ala. 520. But we are not of opinion, that in the present case the statute of limitations, or the lapse of time, can be invoked as a bar to a correction of the mistake. There has not been, until a very recent period, the assertion of any right hostile to that of the complainant: he has had open, peaceable, and uninterrupted possession of the lands it was intended to convey, until he is clothed with a title upon which he can maintain or defend all legal remedies for the recovery of the lands. There is, however, an error in the muniment of his title, which may embarrass the alienation of the lands; which is calculated to engender a sense of insecurity, and may be a source of unfounded, vexatious litigation. The court can properly intervene for the correction of the mistake, under such circumstances, when it would refuse to intervene, if there had been the assertion of a hostile right, and an adverse possession for a much less period than twenty years.

It is true, as insisted in the argument of appellant's counsel, that equity will not interpose to correct an innocent mistake, capable of full correction by the voluntary act of the parties, unless it is shown by allegation and proof, that, upon application to the proper party, a correction was refused, or a reasonable excuse for the omission to make the application is shown. If the grantor in the conveyance were not dead, and the heir at law, to whom the legal title to the lands has descended, was not an infant, this ground of demurrer to the bill would be well taken. But these facts being true, there is no person in being capable of correcting the mistake, and none to whom the application for that purpose could be made properly.—*Williams v. Mitchell*, 30 Ala. 299.

We do not find that the chancellor erred in overruling the demurrer, and the decree must be affirmed.

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Bill in Equity by Remainder-men, for Sale of Lands for Partition, and Account of Rents.

1. *Will; reference to another paper, as part thereof.*—A testator may, in his will, so refer to another instrument or writing executed by him, as to make it a part of his will, as if incorporated therein; but to have this

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effect, the reference must be so clear and distinct as to leave no reasonable ground for mistake as to his intention.

2. *Conclusiveness of probate, as to testamentary character of paper.*—A deed of trust making a partial disposition of his property, having been executed by the testator on the same day with his will, attested by the same witnesses, and admitted to probate with the will, as a part thereof, one of the executors being also made trustee in the deed; the probate is conclusive as to the testamentary character of the deed, until reversed on appeal, or successfully contested by bill in equity under statutory provisions (Code, § 2336).

3. *Execution of power.*—In the execution of a power by a donee or trustee, a direct reference to the power is not necessary, though it must not be left uncertain whether the act was done in execution of the power: it must be apparent that the transaction is not fairly or reasonably susceptible of any other interpretation, than as indicating an intention to execute the power; and this intention must be collected from all the circumstances.

4. *Same; sale and conveyance by executor and trustee; whether referred to power in will, or to void probate decree.*—Where a deed of trust, conferring on the trustee a power of sale, was admitted to probate as a part of the grantor's will, executed on the same day, and referring to the deed; and the trustee, who was also the sole acting executor, procured from the Probate Court an order of sale which was invalid and inoperative, sold the land five years afterwards, and, as executor, executed to the purchaser a deed with covenants of warranty, but did not report the sale to the Probate Court; *held*, that the sale would, *ut res magis valeat quam pereat*, be referred to the power conferred by the deed as part of the will, and not to the order of the court.

5. *Same; presumption in favor of sale, after twenty years.*—After the lapse of twenty years from such sale by the executor and trustee, during which period the purchaser held open, notorious, and uninterrupted adverse possession of the land, although the title of the remainder-men might not be barred, if the power was not legally executed; yet a presumption would arise in favor of the regularity of the sale, and the court would incline to draw inferences favorable to its validity.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. JOHN A. FOSTER.

The original bill in this case was filed on the 29th August, 1876, by James A. McDade and others, surviving children of Nancy E. McDade, deceased, and grandchildren of James McDade, deceased, against Alexander W. McDade and Catherine L. Matthews; and sought a sale, for partition, of certain lands, in which the complainants claimed an interest as remaindermen, under a deed of trust executed by their said grandfather, and an account of the rents received by Mrs. Matthews, who claimed under a purchase at a sale made by the said Alexander McDade, the trustee in the deed.

The deed under which the complainants claimed an interest in the lands, and a copy of which was made an exhibit to their bill, was dated May 25th, 1850, and attested by three witnesses; and it conveyed to said Alexander W. McDade, as trustee, a tract of land containing about four hundred acres, eleven negro slaves, farming utensils, &c., "in consideration of the uses and

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trusts hereinafter mentioned and to be performed, as well as love and affection for" the grantor's children; "to have and to hold the said lands, negroes, and other property, unto the said Alexander W. McDade, his heirs, executors, administrators, and assigns, in trust nevertheless for the uses and purposes hereinafter mentioned; and first, in trust to suffer and permit me, the said James McDade, to have, use, possess and enjoy all of the said property, to my own use, during my life; and after my death, in further trust, that whereas I have made sundry advances to, and paid money for these my five children, as follows: to my daughter Henrietta Campbell, the wife of Thomas Campbell, \$3,194; to my son, William McDade, \$1,869; to Martha Tatum, the wife of Henry Tatum, \$2,664; to Alexander W. McDade, \$1,978; and to Nancy E. McDade, the wife of James McDade, \$696—these several sums embracing the amounts advanced, with interest up to May 25th, 1850; and whereas I desire to make them equal participants of my bounty; and whereas the property herein mentioned is intended to invest a life-estate only in my said several children, and in my daughters to their sole and separate use, free from the control, debts and contracts of their respective husbands: in further trust, therefore, to divide and distribute the said property hereby conveyed, among the said several children herein named, the said Alexander W. McDade among the number; he retaining his part in such manner at first, charging each child with what may have been advanced and paid to or for such child or her husband (?) * will make the share, added to such advance, equal; and the share assigned to each child, or retained, is to be held by such child for life only; and the remainder, at the death of any child, is to vest in the heirs of the body of the deceased, or may be born within nine months after the death of the father; * the shares attached and assigned to my daughters to be held to their sole and separate use during their respective life-times, free from the control, debts and contracts of their respective husbands. But, if any of my said children should die, without heirs of their body living at the time of their death, or may be born in nine months thereafter; then, in such case, the share so attached to the deceased shall revert and vest in the said trustee, and estate created by this deed to be divided among the other surviving children mentioned in this deed, * and the heirs of the body of such as may have departed this life, living at the time of the death of such child so dying without heirs of their body; to the children above named surviving, during their lives, according to the terms of this deed, and the heirs of the

* The reporter can only copy from the transcript, and does not know whether the evident omissions are in the original deed, or are mistakes on the part of the register.—J. W. S.

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body of such as have departed this life, in fee ; and to avoid any litigation in the premises, if the parties can not agree upon and make a satisfactory division, it shall be their duty to select three respectable and disinterested persons to make a division for them ; but, if they can not agree upon a division, or upon the persons to make a division for them, then, on the application of them, or any one of them, to the person holding at the time the office of judge of the Probate or Orphans' Court of said county, it shall be lawful for such judge to nominate and appoint three respectable and disinterested persons ; and if any of the three persons so appointed fail or refuse to act, to appoint from time to time others in the place of such as may fail or refuse to act ; and the division made by the persons so appointed or agreed upon shall be final and conclusive ; and the said Alexander W. McDade may, within a reasonable time after my death, as trustee herein mentioned, sell and convey said land, or any part thereof, for the purpose of making a full, fair and equal division of the same, according to the terms herein expressed. In witness whereof," &c. This instrument was proved and admitted to record as a deed, on proof by one of the subscribing witnesses, June 24th, 1850.

On the same day this deed was executed (May 25th, 1850), and in the presence of the same attesting witnesses, said James McDade made and published his last will and testament, containing the following provisions: "First, I direct all my debts to be paid, so soon as there is money enough belonging to my estate to do so. By deed of trust, bearing date with this my last will and testament, made to my son Alexander W. McDade, and signed and sealed by me in the presence of John F. Mitchell, Alexander Carter and Robert S. Wilson, the subscribing witnesses, I have set apart a portion of my (estate) property for the use and benefit of the five following named children and their heirs: Henrietta Campbell (the wife of Thomas Campbell), William McDade, Martha Tatum (the wife of Henry Tatum), Alexander W. McDade (the trustee), and Nancy E. McDade (the wife of James McDade.) In consideration of the natural love and affection which I bear to my two youngest children, not mentioned in said deed of trust—that is to say, Helen Union McDade, and Richard F. M. McDade—and to my beloved wife, Sarah McDade, I give and bequeath the following named real and personal property and estate"—namely, a plantation containing about nine hundred acres, on which he then resided, about twenty slaves, and other personal property ; "also, five hundred bushels of corn, if so much may be made the present year on my prairie plantation mentioned in said deed of trust, and the entire crop of cotton that may be made the present year on my said prairie plantation. . . . And it is my

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wish and desire, that all property given by me, by this my last will and testament, to my said daughter Helen U. McDade, in case she should marry, shall be held by her in her own name, for her own separate use and benefit, free from the control, debts and contracts of her husband; and if Helen and Richard, or both of them, should die, not leaving heirs of their bodies or body as the case may be, the property as their portion mentioned in this my last will and testament, I direct, is to be vested in my son, Alexander W. McDade, in accordance with and agreeable with a deed of trust which I have made, bearing date of this day, month and year, and witnessed by ———, for an equal distribution among my sons and daughters mentioned in said deed of trust, according to the terms thereof, and general directions of the same; and of such property, Helen and Richard, surviving the other, will receive a portion of the same equal with those mentioned in said trust deed. And the property set apart by this my last will and testament for my wife is to vest in Alexander W. McDade, as trustee, for the benefit of all my children, according to the terms of the deed of trust mentioned above; Helen and Richard to share, and share alike, in such property as may at the death of my wife vest in Alexander W. McDade, as trustee, &c., with those whom I have already mentioned in the deed of trust. . . . I hereby appoint my wife and my son Alexander W. McDade as executors of this my last will and testament," &c.

The testator died soon afterwards, and on the 9th July, 1850, the deed of trust and the will were together admitted to probate, as and for his last will and testament, by an order and decree of the Probate Court of Montgomery. The decree admitting the papers to probate, after reciting the appearance of the adult parties by attorney, and of the infants by guardian *ad litem*, and that no one appeared to contest the probate, proceeds thus: "And it appearing that the said James McDade executed his last will and testament on two separate parcels or sheets of paper, both of which bear the same date, and are attested by the same witnesses on the same day; and John W. Mitchell, Alexander Carter, and Robert S. Wilson, subscribing witnesses to the said papers, coming into open court, and, being first duly sworn, depose and say that they saw the said James McDade signed and seal the said papers as his last will and testament, and that they signed the said papers as witnesses, in the presence of the said James McDade, at his instance and request, and in the presence of each other, and that the said James McDade was at the time of a sound and disposing mind and memory; it is therefore considered, adjudged, and decreed by the court, that the said papers, one of which refers to and recog-

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nizes the other, be admitted to probate, and established as the last will and testament of said James McDade, deceased."

On the 22d July, 1850, the widow filed her waiver of the right to letters testamentary, and her written dissent from the will, and claimed her dower and distributive interest as secured by statute; and a life-estate in one-third of all the lands was thereupon set apart and allotted to her, by the decree of the court, as her dower interest, the lands so assigned her not including any part of the prairie plantation. Letters testamentary were afterwards granted to said Alexander W. McDade (at what time the record does not show), as sole executor. On the 26th December, 1850, the executor filed his petition in said Probate Court, alleging that, in consequence of the widow's dissent from the will, "it appears that the estate of said James McDade can not be administered in conformity with his last will and testament," and asking an order for the distribution of the slaves; and the court thereupon appointed commissioners, who divided the slaves among the parties in interest. On the 23d September, 1850, the executor filed another petition in said Probate Court, alleging that the lands belonging to the estate, which were particularly described, embracing the prairie plantation and the plantation on which the testator resided at the time of his death, "can not be equally, fairly, and beneficially divided among the said heirs and devisees thereof, without a sale," and asking an order of sale for the purpose of making division and distribution among them. Under this petition an order of sale was granted, but at what time does not appear, except inferentially from its recitals that the defendants were summoned to appear on the 5th November, 1850; and this order and decree, which is regular in all respects, and recites that the testimony taken "shows that a sale is necessary for the purpose of making a distribution among the heirs at law of said decedent," directs "the said Alexander W. McDade, executor as aforesaid," to proceed to make the sale.

On the 6th January, 1851, a report of the sale was made by the executor, stating that he had made the sale, "as executor as aforesaid," on the 18th December, 1850; and that William McDade became the purchaser at the sale of the tract of land called the prairie plantation, containing four hundred acres (being the lands involved in this suit), "at the price of \$5.40 per acre, amounting to the sum of \$2,160, and has complied with the terms of sale." On the return of this report, the court made an order, which is without date, in these words: "*This day* came A. W. McDade, executor of the estate of James McDade, deceased, and made a report of the sale of certain real estate belonging to said deceased; from which said report it appears that said executor," having first given due notice by pub-

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lication, "proceeded to sell said lands upon the premises, on the 18th day of December, 1850; and that William McDade, at said sale, became the highest and best bidder for" the tract of land involved in this suit, "containing four hundred acres, more or less, at the price of \$5.40 per acre, amounting to the sum of \$2,160, and has complied with the terms of sale. It is therefore adjudged and decreed by the court, that A. W. McDade, executor as aforesaid, proceed to convey and set over to the said William McDade, his heirs and assigns, all the right, title, interest or estate, which the said James McDade had or held in and to the above-named land at the time of his death." In June, 1853, said executor made a final settlement of his accounts and a distribution of the estate, and, producing the receipts of the several heirs and distributees for the amounts due them respectively, the decrees in their favor were entered satisfied; the decree reciting that, "in consequence of the widow's dissent from the will, in connection with the peculiar and conflicting terms of the last will and testament of said James McDade, it is necessary to distribute said estate as in case of intestacy."

On the 27th December, 1855, said A. W. McDade, professing to act as executor, executed to said William McDade a deed for said tract of land, the material portions of the deed being in these words: "Know all men by these presents, that I, A. W. McDade, executor of the estate of James McDade, deceased, for and in consideration of twenty-two hundred dollars to me in hand paid by William McDade," the receipt whereof is acknowledged, "do hereby bargain, sell, enfeoff and confirm unto the said William McDade, his heirs and assigns, the following tract or parcel of land;" "and I do covenant with the said William McDade, his heirs or assigns, that I am, as executor of the estate of James McDade, deceased, lawfully seized in fee of the said premises; that I, the said A. W. McDade, executor of said estate, do relinquish all right, title and claim to said land; that I have a good right to sell and convey the same to the said William McDade, his heirs or assigns; and that I do warrant and defend the said premises unto the said William McDade, his heirs or assigns forever, against the lawful claims and demands of all persons. In witness whereof," &c. William McDade took possession of the land under his purchase from said executor, but at what time does not appear, and afterwards sold and conveyed to Geo. H. B. Matthews; and the defendant, who was the widow of said Matthews, was in possession claiming under him.

Mrs. Nancy E. McDade, the mother of the complainants, died in 1864, her children being all infants at that time; and the eldest attained his majority in April, 1875. In their origi-

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nal bill, the complainants set up the deed of trust to said A. W. McDade, as a deed; claiming that the sale to William McDade was without authority, and that they, as remainder-men on the death of their mother, were entitled to one-fifth part of the property conveyed by the deed; and asking that the lands be sold for division, and that they be paid, out of the proceeds of sale, the amount ascertained to be due to their mother, on the statement of an account among the several beneficiaries named in the deed. Mrs. Matthews, in her answer, set up the proceedings had in the Probate Court, in the matter of the probate of the will and the sale of the land; copies of which several proceedings, as above stated, were made exhibits to her answer. She contended that the probate of the paper as a will was conclusive on all the parties interested in the estate, and alleged that the decree of the court, assuming jurisdiction of the estate as in case of intestacy, was not only rendered necessary by the widow's dissent from the will, but was rendered by the common consent and agreement of all the adult heirs; that the lands were also sold by like consent and agreement, and the order of sale was obtained because it was thought doubtful whether the executor could make a valid sale without an order of court; that the final distribution of the estate was also made by common consent of all the parties in interest, and that the complainants' mother received, on this distribution, a greater share of the assets than she was entitled to under the deed. She set up these proceedings in the Probate Court as a plea in bar, and pleaded adverse possession and the statutes of limitations of ten and twenty years; and also demurred to the bill, for want of equity, and on account of the staleness of the demand. The complainants afterwards amended their bill, by alleging the probate of the deed as a part of the will; but they insisted that, whether the instrument was held to be a deed or a will, the power of sale had never been legally executed, and that they were entitled to the relief prayed in their original bill.

The chancellor overruled the demurrers and the pleas, and held that the complainants were entitled to relief as prayed in their bill; that the sale of the lands by the executor was made under the probate decree, and was not a valid execution of the power, whether the instrument creating it was regarded as a deed or as a part of the will. The defendant appeals from this decree, and here assigns each part of it as error.

CLOPTON, HERBERT & CHAMBERS, for appellant.—(1.) The testamentary character of the deed of trust is conclusively established by its probate as a part of the will.—*Deslonde v. Darlington*, 29 Ala. 92; *Blakey v. Blakey*, 33 Ala. 611; *Herbert v. Hanrick*, 16 Ala. 581; *Peacock v. Monk*, 1 Vesey, 127;

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Tompkins v. Ladbroke, 2 Vesey, 591; 1 Jarman on Wills, 5th Amer. ed., 37, note 10; *Goodman v. Winter*, 64 Ala. 426. (2.) Although the Probate Court has no jurisdiction to execute a trust, it has power to declare the invalidity of a bequest creating a trust.—*Johnson v. Longmire*, 39 Ala. 146. That court had jurisdiction to make a final settlement and distribution of the funds of the estate, and did make a decree for that purpose; and that decree is final and conclusive, not having been reversed on error, nor impeached by bill in equity. If the executor erred in paying over the money to the life-tenants, without requiring security from them, the remainder-men may have recourse against him, but they have no claim on the land. (3.) The power of sale conferred on A. W. McDade was a personal trust, and did not attach to the office of executor.—*Tarver v. Haines*, 55 Ala. 503. The Probate Court then had power to order a sale of lands for distribution, if the will did not authorize the executor to sell; and a copy of the will being made an exhibit to the petition, and showing that no power of sale was given to the executor (though given to the same person as trustee), the court had authority to grant an order of sale.—*Arnett v. Bailey*, 60 Ala. 439. If, then, the sale is to be referred to the order of the court, it must be sustained as valid. (4.) But the executor's deed to William McDade does not purport to be made under any order of court, and was not executed until after five years had elapsed, and two years after the decree of final distribution; and it shows on its face that the executor acted under powers supposed to be conferred by the will, of which the deed was a part. The deed, then, must be referred to the valid power, and is a good execution of that power.—*McDonald v. McRae*, 57 Ala. 423. (5.) After the lapse of twenty years, during which the purchaser has had continuous adverse possession of the land, the court will make all reasonable presumptions in favor of the regularity of the sale.—*McArthur v. Carrie*, 32 Ala. 76-87; *Baker v. Prewitt*, 64 Ala. 551-57; *Harrison v. Heflin*, 54 Ala. 558; *McCartney v. Bone*, 40 Ala. 536.

D. S. TROY, *contra*.

SOMERVILLE, J.—A testator may, in his will, so refer to another instrument or paper executed by him as to constructively incorporate it therein, and the two may thus be constituted together but one instrument. This reference must be so clear and distinct as that there can be no reasonable room for mistake of intention.—1 Jarman on Wills (5th Amer. Ed. 1880), 37-39; *Chambers v. McDaniel*, 6 Ired. L. 226; *Peacock v. Monk*, 1 Vesey, 127.

The deed of trust, bearing date May 25, 1850, was executed

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by the testator, James McDade, on the same day with his last will. The two instruments bear the same date, and are attested by the same subscribing witnesses. They both have reference to the same general subject-matter—the distribution of the testator's property—and the one expressly refers to the other. The trustee appointed to execute the one instrument, which in form is a deed of trust, is also one of the two executors appointed to execute the will. Whether these facts rendered the two instruments legally but one, and constituted their execution but a single testamentary act, in such manner as to authorize the probate of the will and the deed together as *one paper*, it is unnecessary to decide; for, even the same instrument may be sometimes construed to operate in part as a *will*, and in part as a *deed*, if the intention to this end be clear.—*Kinnebrew v. Kinnebrew*, 35 Ala. 628. It is enough for our purpose, that the Probate Court assumed jurisdiction, and, after notice to all interested parties, probated the two instruments unitedly, as the last will and testament of James McDade. Its jurisdiction in the matter was full, exclusive, and final. The power to probate a will, necessarily involves the power to decide whether the paper presented for probate is in fact *a will*, or *not a will*. Hence, it has been held, that the probate of a *forged paper as a will* is binding and valid until revoked, and is conclusive on collateral assaignment.—*Allen v. Dundas*, 3 T. R. 129; 1 Jarman on Wills (5th Amer. Ed.), 48–53. The *testamentary character* of the paper is always, in such cases, a question of primary consideration, without the determination of which there can be no probate of it. This question was settled by the action of the Probate Court, which is final and conclusive upon all parties in interest, unless its judgment is assailed otherwise than in a mere collateral proceeding. Its validity could have been contested afterwards only by direct appeal, or by a bill in chancery filed, under the provisions of the statute, at any time within five years after the date of probate.—Code of 1876, § 2336; *Goodman v. Winter*, 64 Ala. 410; *Hall's Heirs v. Hall*, 47 Ala. 296; *Deslonde v. Darrington*, 29 Ala. 92; *Hardy v. Hardy's Heirs*, 26 Ala. 524; 1 Jarman on Wills (5th Amer. Ed. 1880), 48–53.

These views are pertinent, chiefly, in their bearing upon the execution of a *power* vested by the deed of trust in Alexander McDade, who was both trustee under this instrument, and the sole acting executor under the will. The question is, whether this power can be construed to have been properly executed, so as to affect the rights of the complainants. McDade, as trustee, had conferred on him by the testator the *power to sell* the land in controversy, within a reasonable time after the death of the testator, for the purpose of making a division among those en-

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titled. He did make a sale and conveyance of it, to one William McDade, through privity with whom the appellant claims title. We are to determine whether this sale and conveyance are referable to the power, and were intended as an *execution* of it. If so, they operate to cut off the *remainder* created in the appellees, and possession under the deed for over twenty years, with claim of adverse possession, has matured into a good title.

We take the rule as settled, that while, in the execution of a power, the donee or trustee of the power must not leave it uncertain whether or not the act done is in execution of the power, a *direct* reference to the power is never necessary in order to make the act referable to it.—2 Story's Eq. Jur. § 1062 *a*. In other words, "it is not necessary that the intention to execute a power shall appear by express terms, or recitals in the instrument. It is sufficient that it shall appear by words, acts, or deeds, demonstrating the intention."—*Ib.* § 1062 *a*, note 5; *McRae's Adm'r v. McDonald*, 57 Ala. 423. It must be apparent that the transaction in question is not fairly or reasonably susceptible of any other interpretation, than as indicating an intention to execute the power; and this intention is to be collected from all the circumstances.—*Sir Edward C'lere's case*, 6 Co. R. 17; *Pomeroy v. Partington*, 3 Term R. 665.

The deed made by Alexander McDade, to William McDade, is dated December 27, 1855, and contains, it is true, no reference to the power. It is insisted, however, that this conveyance may be as well referred to *the power* conferred by the *Probate Court* upon the executor, authorizing him to sell, which he seems to have previously obtained on application to that tribunal. *It was manifestly, we think, intended as an execution of the one power, or of the other.* If referred to the will, its execution will be operative and valid. If referred to the order of the Probate Court, it will be inoperative and invalid; for it needs no argument to show, that this court had no jurisdiction, under the circumstances, to make this order of sale, which was therefore a nullity.—*McRae's Adm'r v. McDonald*, 57 Ala. 423. In such cases, the inclination of the court is, always, to refer the act to the valid power, so as to afford some field for its operation, upon the maxim, *Ut res magis valeat, quam pereat*, if this can be done consistently with other prevailing rules of construction.—*C'lere's case*, 6 Co. R. *supra*; 2 Story's Eq. Jur. (Redf. Ed.) § 1062 *a*, note 5, p. 267.

The deed under consideration purports to be made by Alexander McDade, in his capacity as *executor* of James McDade. It conveys a fee-simple interest in the lands, and contains a covenant as executor, not only of his right to sell and convey, with a warranty of title, but that he is "*lawfully seized in fee*"

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of the premises conveyed, *as executor* of the last will and testament of the deceased. It was, furthermore, executed more than five years after obtaining the authority of the Probate Court to sell. This fact is important, in consideration of the further circumstance, that no report of sale was made to the Probate Court, and no authority to convey was obtained, which could only be granted on report of the payment of the purchase-money, and confirmation of the sale by formal order of the court.—Code of 1876, §§ 2467–68. The utter absence of conformity to these statutory requirements, and the delay of five years, evince, in our opinion, a clear intention not to refer the deed to the power conferred by the Probate Court. It is persuasive of the conclusion that, after so great a lapse of time, the executor opened his eyes to the fact of the invalidity of this order, and refused, on this account, to attempt its execution.

The language of the deed evinces, on the contrary, a strong intention to refer it to the power conferred by the will—or, what is the same thing, to the power conferred by the deed of trust, which was probated, and considered as part and parcel of the will. An executor is often a trustee,—the powers of a trustee being attached, not to the executorial office, but to the executor in his personal or individual capacity. —*Perkins v. Lewis*, 41 Ala. 649. Hence, the covenant of actual seizin in the grantor, and the conveyance by him of a fee-simple interest, as executor, in the lands in question, can be referred to nothing else than the will. As we have said, it is clearly referable to one of the two powers, and must have been intended as an execution of the one or the other; and as it is obviously not intended to be referred to the void power, we are authorized to conclude that the intention, gathered from all the circumstances, was to refer it very clearly to the valid powers conferred by the will. *Id certum est, quod certum reddi potest.*

There is another view of this case in harmony with the conclusion which we have reached. More than *twenty years* have elapsed since the execution of this power, and the possession of the vendee and those claiming under him has been open, notorious, adverse, and uninterrupted since then. And while the statute of limitations can not be invoked to bar the claim of the remainder-men, if the power in question has never been so executed as to legally divest their title, yet a presumption is raised by this lapse of time, upon another principle, favorable to the repose of appellant's title. Twenty years is a period of time beyond which the courts are indisposed to permit past human transactions to be disturbed by judicial investigation. *McArthur v. Carrie's Adm'r*, 32 Ala. 75, 88; *Garrett v. Garrett*, 69 Ala. 429; *Baker v. Prewitt*, 64 Ala. 551. In *Sims v.*

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Aughtery (4 Strob. Eq. 103), the following language was used by the Supreme Court of South Carolina: "Twenty years continued possession will raise the presumption of a grant from the State, of deeds, wills, administrations, sales, partitions, decrees, and (the chancellor has said) of almost anything that may be necessary to the quieting of title, which no one has disturbed during all that period."—*McArthur v. Carrie's Adm'r*, *supra*, pp. 91–93. And this court has held, that this presumption will not be defeated by infancy, coverture, or other personal disability.—*McCartney v. Bone*, 40 Ala. 536; *Garrett v. Garrett*, *supra*. Nor will its operation be suspended by causes which have been legally adjudged to suspend the running of statutes of limitation.—*Harrison v. Heflin*, 54 Ala. 552. It is in accord with the spirit of this principle that the statute intervenes to prevent any legal disability from being permitted to so operate as, under any circumstances, to authorize the probate of a will to be disturbed after the lapse of twenty years (Code of 1876, § 2338); or, in fact, to authorize any disability to extend the period of limitation beyond twenty years from the time the cause of action accrued.—Code, § 3236. It would be but a just application, we think, of this rule of presumption, to permit it to be invoked, in order to impart probability to the regular and proper execution of a power by a trustee, or an executor. It should, at least, incline the mind of the court to draw inferences from the facts favorable to the repose of titles, which may be affected by the execution of such a power. This we are disposed to do, and we need extend the principle no farther at present.

These views must operate to reverse the decree of the chancellor, and necessarily result in a dismissal of complainants' bill; and a judgment to this effect is accordingly ordered to be rendered in this court.

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Application for Mandamus to Chancellor, in matter of Taxation of Costs.

1. *Costs in chancery.*—In the imposition of costs, the chancellor exercises a legal discretion, governed by precedents and by general rules applicable to the varying circumstances of particular cases; and this discretion is fully exercised and exhausted, when a decree for the payment of costs is embodied in a final decree settling the equities of the case, defining and declaring the rights of the parties.

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2. *Same; final decree as to, not amendable or revisable at subsequent term.*—While clerical errors may be corrected at a subsequent term, the sentence and judgment of the court—that which has been deliberately ordered and adjudged in the final decree—can not be changed or modified at a subsequent term; and this is as true of that part of the decree which adjudges the costs, as of any other part.

This was an application, by petition, by Patrick Robinson and W. T. Hatchett (the latter in his representative character as administrator of the insolvent estate of John Lawler, deceased), for a writ of *mandamus* directed to Hon. JOHN A. FOSTER, chancellor, presiding in the Chancery Court at Montgomery, requiring him to vacate and set aside a decree rendered in a cause pending in said court, in the matter of the apportionment of costs. A transcript of the record of the cause, showing the proceedings had therein, was made an exhibit to the petition filed in this court, from which these facts appear: In February, 1874, Patrick Robinson, claiming to be the owner of a judgment rendered against William T. Hatchett as the administrator of the estate of John Lawler, deceased, filed his bill in said Chancery Court, against said Hatchett as administrator, and against the Montgomery Mutual Building and Loan Association, a domestic corporation; alleging that said Lawler in his life-time had executed to said corporation a mortgage to secure a note given for money borrowed; that Lawler's estate had been declared insolvent, and that the association was proceeding to foreclose the mortgage by a sale under the power therein contained, and was claiming usurious interest and illegal charges in excess of the amount justly due on the debt. The bill prayed an injunction of the sale under the mortgage, a discovery and account of the mortgage debt, and general relief. An answer to the bill was filed by the defendant association, denying the charge of usury, and demurring to the bill on various grounds specifically assigned. An answer was filed by the administrator, admitting all the allegations of the bill; and he also filed a cross-bill, charging usury in the mortgage debt, and asking a discovery and account. At the October term, 1882, of said court, a decree was rendered in said cause as follows: "This cause, coming on to be further heard, was submitted on the original and cross bills, upon the pleadings, former decrees, testimony heretofore offered, and report of the register confirmed at this term of the court. It appears from said report that," after deducting all credits, the amount due to the said association is \$300.68; and it is therefore adjudged that the association is entitled to have the property conveyed by the mortgage sold in satisfaction of this balance, and the register is ordered to make the sale; and the decree then proceeds: "The register will pay over to the solicitor or other

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authorized agent of said association, out of the proceeds of said sale, the said sum of \$300.68, with interest thereon from the 14th October, 1882, to the day of payment, less the costs of this cause, if the said proceeds shall amount to that much; and if such proceeds shall not amount to that much, then the register will pay over as aforesaid whatever sum shall have been realized, less the costs of this cause. After paying as above prescribed, the register will pay over to said W. T. Hatchett, the complainant in the cross-bill, the balance of said proceeds, less the amount retained for costs, if any there shall be, to be by him administered as assets of the estate of said John Lawler, deceased, under the orders and decrees of the Probate Court of Montgomery. It is further ordered, adjudged, and decreed by the court, that the Montgomery Mutual Building and Loan Association, defendant to the original and cross bills, shall pay all the costs of this cause, to be retained as above provided." At the next ensuing term of the court, on motion of the defendant association, the chancellor modified the decree as to the payment of costs, and apportioned them between said association and the administrator, imposing one-half on each. On a subsequent day of the term, a motion was made by Robinson, the complainant in the original bill, for a revocation of this order, on the ground that the court could not thus change the final decree rendered at the preceding term. The chancellor overruled and refused this motion, and his refusal is the ground of the application to this court.

SAYRE & GRAVES, for the petitioners.

D. CLOPTON, *contra*.

BRICKELL, C. J.—In the imposition of costs, the chancellor exercises a legal discretion, governed by precedent, and by general rules applicable to the varying circumstances of particular cases. But this discretion is exercised and exhausted, when a decree for the payment of costs is embodied in a final decree settling the equities of the case, and defining and declaring the rights of the parties. If from such a decree an appeal was taken, the decree as to costs would be open to modification or reversal, if in other respects there was found in it error, or that an alteration of it was just and equitable. In the execution of the decree, and as to matters subsequently arising, a further consideration of the cause may be, and is usually, necessary in the Court of Chancery; but upon such consideration, the term of the court at which the decree was passed and entered having expired, it is not within the competency of the court, upon mere motion, to vary or impugn in any material

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respect the original decree.—2 Dan. Ch. Pr. 1371. Clerical errors or omissions may be corrected; but the sentence of the court, that which has been deliberately ordered and adjudged, can not be varied. And this is as true in reference to the decree for costs, as to any other part of the decree, though as to their imposition the court had originally a discretion. The discretion has been exercised, and can not be recalled, without rendering it uncertain when there will be a final sentence disposing of them.

The original decree very clearly and explicitly adjudged the costs against the building and loan association; and though it may have been more equitable that the costs should have been apportioned between the parties, that was a consideration, it is presumed, upon which the judicial mind passed judgment. Courts can not reverse or annul their own judgments or decrees at a term subsequent to their rendition, because of errors of fact or law, upon the mere summary motion of parties supposing themselves to be aggrieved.—*Ex parte Cresswell*, 60 Ala. 378.

A rule *nisi* will be granted, requiring the chancellor, on the first day of the next term of this court, to show cause why a peremptory *mandamus* should not issue in accordance with the prayer of the petition.

STONE, J., not sitting.

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Bill in Equity to Enforce Lien or Charge on Common Fund, and for Adjustment of Accounts and Distribution.

1. *Equitable lien on common fund, created by agreement.*—Commissioners being appointed by the governor, under authority conferred by a special statute, to locate and procure patents for the State to swamp and overflowed lands donated by act of Congress, their compensation being twenty per cent. of the amount realized by the State on the subsequent sale of the lands, and their expenses to be paid by themselves; an agreement among them, by which one was to advance moneys deemed necessary in the execution of the common business, to be reimbursed out of the fund provided as compensation when collected, creates a charge or lien on the fund, for the amount so advanced, in the nature of an equitable mortgage; which lien or charge is not capable of enforcement at law, and is peculiarly within the jurisdiction of a court of equity.

2. "*Swamp Land Commissioners;*" not partners, but tenants in common.—The "*Swamp Land Commissioners,*" appointed by the governor under the provisions of the act approved February 24th, 1860 (Sess. Acts VOL. LXXII.

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1859-60, p. 117), whose duties were to locate and procure for the State patents for the swamp and overflowed lands donated by act of Congress approved September 28th, 1850, and who were to receive as compensation for their services twenty per-cent. of the amount realized by the State on the subsequent sale of the lands, were not partners *inter sese* in the compensation to be earned, but rather sustained to each other the relation of tenants in common.

3. *Tenants in common; right to compensation for extra services.*—Ordinarily, one tenant in common can not recover of the others compensation for services performed by him in managing or taking care of the property, without a promise, express or implied, to pay for such services; but the rule is otherwise, when he performs extraordinary services for the common benefit—services not within the duties required of him by law, nor within the contemplation of his co-tenants; for all charges and expenditures thus incurred, the right of contribution exists, and may be enforced as an equitable charge on the common fund or property.

4. *"Swamp Land Commissioners;" rights of S. S. Houston's heirs, under special statute authorizing suit.*—Under the special statute approved December 17th, 1873, authorizing the three surviving commissioners "and the legal representatives or heirs of S. S. Houston," the deceased commissioner, to prosecute a suit in equity against the State, for the purpose of determining their compensation and adjusting the rival claims of other persons (Sess. Acts 1873, pp. 65-67), the heirs of said Houston only succeeded to his rights, and took his share of the common fund charged with all liens to which it was subject in his hands.

5. *Same; limitation of suit for money advanced by one.*—The complainant, one of said commissioners, claiming contribution out of the common fund for moneys advanced by him in aid of the common enterprise, which were "to be refunded to him out of the compensation to be received from the State;" such claim did not accrue until the money was received, and the statute of limitations did not begin to run against him, in favor of the other commissioners, until that time; and the bill showing that it was filed within one year after the receipt of the money, the claim is not barred by the statute of limitations, nor by the staleness of the demand.

APPEAL from the Chancery Court of Montgomery.

The record does not show the name of the chancellor who presided in the court below.

The bill in this case was filed on November 13th, 1878, by James R. Powell, against Urban L. Jones, D. P. Forney, and the heirs of S. S. Houston, deceased, and contained the following allegations: (1.) On April 17th, 1860, Governor A. B. Moore, acting under authority conferred on him by an act of the General Assembly of Alabama, approved February 24th, 1860, entitled "An act to secure to the State of Alabama the lands appropriated to the State of Arkansas and other States, to reclaim the swamp lands within their limits, by act of Congress approved September 28th, 1850," appointed the complainant, said Jones, Forney and Houston, "as agents to select and determine by proper proof the swamp and overflowed lands within the limits of this State, according to the provisions of said act," and issued to them a commission under the great seal of the State; and at the same, the State of Alabama, acting by its then governor, said A. B. Moore, "made a certain

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contract in writing with said parties, by which said agents were to select, locate and prove up the swamp and overflowed lands to which the State was entitled under said act of Congress, and were to pay their own expenses of every kind, and were to be allowed as compensation twenty per-cent. of the proceeds of said lands when they should be sold. Search has been made for said contract, and it can not be found. (2.) On March 17th, 1874, said commissioners "filed their bill in equity in this court against the State of Alabama, on said contract, to recover from said defendant the compensation due them for the faithful performance by them of their part of said contract; and said matter was fully litigated, and a decree was rendered in said cause by this court, on the 5th January, 1878, ascertaining the amount due to each of the parties to said cause, which decree was afterwards affirmed by the Supreme Court of the State; and by said decree there was ascertained to be due to each of said commissioners the sum of \$1169.64." (3.) "The question of the rights of said commissioners *inter se* was not decided in said case by this court, nor involved or necessary to be decided therein; nor was said question raised, or presented, or litigated, but the sum found to be due to said commissioners as a body was equally divided between them." (4.) Complainant "paid a large sum, to-wit, \$1,500, expenses of said commissioners in and about the execution and performance of their duties under said contract;" that is, he advanced to said Houston \$500 at one time, and \$300 at another, and made three trips to Washington at an aggregate expense of \$300, and paid the expenses of Governor Moore on a journey to Washington in and about the business of the commissioners, procuring patents, &c. "All of said sums of money so paid by your orator were expended in the payment of the necessary and proper expenses of said commissioners, in the execution of their said contract; and the other commissioners have not repaid to him any part of the sums so expended, nor has any one of them; nor did they bear any part of the expenses incurred by said commissioners, or, if any, only a small part, the amount of which is unknown." (6.) "By agreement and contract between complainant and said other commissioners, after they had together examined the maps, &c., in the land-office at Greenville, the portion and character of the work to be done by each was agreed on and determined; by which agreement, complainant was, as his share of the work, to attend to and transact all the business with the General Land-office and Department at Washington, and the expenses of the work to be done were to be borne equally by the said commissioners; your orator agreeing, at the same time, to advance the money to pay said expenses, which were to be refunded to him out of the compensation to be received

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from the State; said U. L. Jones was assigned to East Alabama, said Houston to the Perdido and South Alabama, and said Foreney to North Alabama." (7.) Complainant "avers that he has the right to have paid to him, out of said moneys so decreed to him and said other commissioners, said several sums of money, with interest thereon from June, 1860, the time when said sums of money were so advanced; and that this court has the right to partition said sums of money among those entitled thereto, after deducting from the gross amount the expenses due to each, such deduction and partition never having been made; and that said accounts are complicated, and can not well be settled in a court of law. He avers, also, that said U. L. Jones is insolvent, and that no other court than this can do complete justice to all the parties in the settlement of said expense account." (8.) Complainant charges, "that he performed fully and faithfully, according to his agreement with said other commissioners, every thing by him agreed to be done, and claims that he is entitled to his *pro rata* share of said moneys, as well as the expenses by him incurred as aforesaid; and that he is also entitled to additional compensation, for the extra services rendered by him in making his last trip to Washington city, for which \$200 would be a reasonable compensation." (9.) The moneys adjudged to be due to the commissioners are in the hands of George W. Stone, who was their solicitor in the suit, and who has a claim and lien on the fund for his professional services; and he is made a defendant to the bill. On these allegations, the bill prayed that the court "ascertain the amount of the expenses paid by complainant, with interest thereon, and the amount of expenses paid by each of said other commissioners, and the value of the services rendered by each in the execution of said contract, or the amounts to which each is entitled, and the amount of the solicitor's fee their said counsel is entitled to retain out of the said fund in his hands; that the residue of said fund be paid into the registry of this court, to be equitably divided among the several parties thereto;" and for other and further relief, under the general prayer.

An answer to the bill was filed by the infant heirs of S. S. Houston, by their guardian *ad litem*, in which was incorporated a demurrer to the bill, on the following grounds: 1st, that the matters alleged are shown to be *res adjudicata*, and the complainant is concluded by the former decree; 2d, that the bill shows that complainant has no claim upon that portion of said fund to which these infant defendants are entitled; 3d, that if the complainant has any right to be reimbursed for moneys expended by him, it is a right which must be enforced against the personal representative of said S. S. Houston, and not against these defendants as his heirs; 4th, that the alleged claim

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is barred by the statute of limitations, and is a stale demand; 5th, that complainant has a complete and adequate remedy at law. An answer was also filed by Forney, in which was incorporated a demurrer for want of equity, and because the complainant had a complete and adequate remedy at law; and an answer was filed by U. L. Jones.

An amended bill was afterwards filed, in which the second paragraph of the original bill was struck out, and the following inserted in lieu of it: "An act was passed by the General Assembly of Alabama, approved December 17th, 1873, and entitled 'An act to provide for the adjustment of the claims of all agents, commissioners, and other persons claiming compensation for services rendered in selecting and securing title to the swamp and overflowed lands in the State of Alabama.' The said S. S. Houston died shortly before the passage of said act; and prior to, and at the time of the passage of said act, there were other persons preferring claims against the State of Alabama, for services alleged to have been rendered in selecting and securing title to said swamp and overflowed lands, which claims did not grow out of, and were not connected with said contract made by and between said commissioners and Governor A. B. Moore, but were antagonistic to their claims under said contract. By virtue of said act of the General Assembly, your orator, and said U. L. Jones, D. P. Forney, and the heirs of said S. S. Houston, there being then and now no representative of his estate, filed their bill in this court against the State of Alabama, for the purpose of ascertaining, determining, and apportioning the compensation that may be due, and become due, for services rendered by any and all persons, in and about the selection and survey of said lands, and in procuring titles therefor, and in making sales thereof; and several persons, claiming compensation for services rendered as aforesaid, were, on their several petitions, admitted as parties to said suit, and one M. J. Saffold among them; and upon proceedings had in said cause, a decree was therein rendered, on (to-wit) January 5th, 1878, ascertaining and decreeing that there was to be paid to your orator, said U. L. Jones, and D. P. Forney, each, the sum of \$1169.64; and the same amount to the heirs of said S. S. Houston, and to said M. J. Saffold." Another amendment to the bill was the addition of an averment that there had never been a settlement of accounts between the said several commissioners, and an offer to do equity by the complainant.

The only orders or decrees shown by the record seem to be mere extracts from the register's docket, headed "Orders of Court," and in these words: "April 24th, 1882. Ordered and decreed, that the demurrer be sustained, and the motion to dismiss the bill for want of equity should be granted, unless the

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same is amended. Ordered, that the complainant be allowed to amend his bill." "April 26th, 1882. Leave is granted to complainant to file an amended bill. Submitted on motion of the administrator of D. P. Forney to dismiss the bill for want of equity, and on demurrers which are re-filed to the bill as amended. It is ordered, that all the demurrers, which are re-filed to the bill as amended, be sustained, except the third, which is overruled; and complainant objecting further to amend, the bill is dismissed for want of equity, at his costs."

The appeal is sued out by the complainant. The errors assigned are—1st, the sustaining of the demurrer to the bill as amended; 2d, the dismissal of the bill; 3d, the final decree rendered.

CLOPTON, HERBERT & CHAMBERS, for appellant.—(1.) On the facts stated in the bill, the several commissioners were partners as among themselves in the compensation to be earned. Tyler on Partnership, 11; Lindley on Partnership, 2; *McCrary v. Slaughter*, 58 Ala. 233; *Smith v. Garth*, 32 Ala. 368; *Meaher v. Cox*, *Brainard & Co.*, 37 Ala. 201; *Emanuel v. Draughan*, 14 Ala. 303; *Autrey v. Frieze*, 59 Ala. 590. That each partner has a lien on the partnership assets and effects, for any balance due him on a proper accounting together, see *Warren v. Taylor*, 60 Ala. 218, and authorities there cited. (2.) If the relation of partners did not exist between the parties, then they were tenants in common in the compensation to be earned; and a court of equity will decree an account between them, where one has received a greater share of the profits than he was entitled to receive, and there are complicated matters of account between them unadjusted.—*Autrey v. Frieze*, 59 Ala. 588; *Morrow v. Riley*, 15 Ala. 710; *Grigsby v. Nance*, 3 Ala. 347. (3.) These matters of account were not involved in the former suit, and neither were nor could have been determined in that suit; and they are not concluded by the decree rendered in that suit.—*Freeman on Judgments*, §§ 249–56; *Chamberlain v. Gaillard*, 26 Ala. 504; *Shaw v. Beers*, 25 Ala. 449; *Gilbreath v. Jones*, 66 Ala. 129, 132; *Sawyer v. Randall*, 55 Maine, 227; *Mozley v. Alston*, 1 Phil. 798; *Walker v. Powers*, 14 Otto, 249. (4.) The statute of limitations did not begin to run until the money was recovered from the State, which was less than one year before bill was filed.—*Bradford v. Spyker*, 32 Ala. 134; *Cameron v. Copeland*, 43 Ala. 201.

GUNTER & BLAKEY, for Houston's heirs (and with them TROY & TOMPKINS, for Forney's administrator, and LESTER C. SMITH, for U. L. Jones), *contra*, contended that the decree rendered in

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the former suit was conclusive; citing the case of the *Santa Maria*, 10 Wheaton, 441-44.

SOMERVILLE, J.—The present appeal is taken from a decree of the Chancery Court, sustaining a motion to dismiss appellant's bill for want of equity; also sustaining a demurrer interposed by one or more of the defendants, going to the equity of the case made by the bill. In reviewing the correctness of this ruling, we must, of course, take as true the facts alleged in the bill, so far as well pleaded; and we can not look to, or consider, the denials of the several answers.

The claim of the appellant, Powell, here sought to be enforced, is for certain moneys alleged to have been advanced by him to pay the expenses of himself and the other commissioners, or agents, appointed by the State of Alabama to locate the "Swamp Lands" appropriated to the State by act of Congress approved September 23, 1850. It was made the duty of these agents to select and determine, by proper proof, these "Swamp Lands" within the limits of this State; to make a report of their work to the Governor, and to procure patents for the same from the United States, in the name, and for the benefit of the State. The compensation to be received by them was *twenty per cent.* of the amount realized by the subsequent sale of these lands, whenever disposed of by the State.—Acts, 1859-60, pp. 117-118. Upon suit being brought against the State, it was adjudged that the four commissioners were each entitled to something less than twelve hundred dollars; the heirs of one of them, who had died, being made parties, under authority of a special act of the legislature. The money was collected, and is now in the custody of the attorney of the parties, subject to the control of the Chancery Court.

The bill, in substance, avers that the expenses of the commissioners, incurred in the prosecution of their official duties, were to be borne equally by them; that appellant was to advance certain moneys deemed necessary to the execution of the joint enterprise, for which he *was to be re-imbursed out of the fund* of twenty per cent., when collected from the State. It is manifest that such an agreement, resting on *contract* made between the parties, would, if proved, constitute a *lien* or *charge* upon the fund in question, which would be in the nature of an equitable mortgage. All that is required to this end is, that the intention of the parties, as deducible from the contract, be clear in its purpose to pledge the fund *as a security* for the debt created. Accordingly, an agreement that a debt shall be paid out of the proceeds of certain property, or that the property shall be *bound for* the debt, has been usually construed to create an equitable mortgage.—Miller on Equitable

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Mortgages, 3; Jones' Chat. Mortg. § 13; *Donald v. Hewitt*, 33 Ala. 534, 548; *Butts v. Broughton*, at present term (*ante*, p. 294); *Newlin v. McAfee*, 64 Ala. 357; 1 Jones' Mortg. §§ 166-167; *Jackson, Morris & Co. v. Rutherford*, at present term. Such a lien, being governed by the general doctrine of trusts, constitutes one of the peculiar subjects of equity jurisdiction, being incapable of enforcement at law.—*Dunning v. Stearns*, 9 Barb. (N. Y.) 630; *Kirksey v. Means*, 42 Ala. 426.

Independently, however, of this alleged contract lien claimed by complainant upon this fund, an equity is originated in his favor, arising out of the relationship of the parties. We do not think this relationship is that of *partners*, who are joint owners of the whole property, each having the power to transfer or dispose of the entire partnership effects. It is rather in the nature of a *tenancy in common*, created in the fruits of the joint venture—a legal *status*, which has been likened by Pothier to a “*quasi-partnership*” in some of its characteristics. One of several tenants in common can not dispose of the whole property, but only of his undivided share. He possesses, as it is technically expressed in the books, “the whole of an undivided moiety of the property, and not an undivided moiety of the whole property.”—2 Black. Com. 182, 191-193; Story on Part. §§ 89-90. One of its essential attributes is unity of possession, a violation of which, by *conversion* or *ouster*, is a good ground of action.—*Perminter v. Kelly*, 18 Ala. 716; *Bishop v. Blair*, 36 Ala. 80. One most frequent illustration of such a co-tenancy is a cultivation or letting of land on shares, with an agreement among those interested to divide the specific products, or crops.—*Smyth v. Tankersley*, 20 Ala. 212; *Williams v. Nolen*, 34 Ala. 167; *Pruitt v. Ellington*, 59 Ala. 454.

The ascertainment and enforcement of the liabilities growing out of such co-tenancies is a fruitful source of equity jurisdiction, especially in the matters of contribution and account.—1 Story's Eq. Jur. §§ 466, 505; Freeman on Co-Tenancy, § 269. It is true that one tenant in common, like a partner, can not recover of his co-tenant compensation for services performed by him, ordinarily, in managing or taking care of the property, without an *express or implied promise to pay* for such services. The plain reason is, that he is doing nothing more than his duty. But the rule is otherwise, where he performs services not imposed by his relation of co-tenancy; for these may be regarded as extraordinary in their character—not within the duty of the one, nor the contemplation of the other. Freeman's Co-Ten. and Partition. So, of expenses necessarily incurred, or money advanced for the benefit of a joint adventure, the fruits of which are to be enjoyed in common. If the

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duty to be performed is joint, or common to all, and not several as to any one, the performance of it would be the removal of a burden or associated liability, much in the nature of discharging an incumbrance, or satisfying a lien.—*Van Horne v. Fonda*, 5 John. Ch. Rep. 388; *Gwineth v. Thompson*, 19 Amer. Dec. 350. “The purchase of an outstanding title, the removal of a tax, or other lien or incumbrance,” says Mr. Freeman, “and the payment of a sum of money for the preservation of the common property, or for the protection or assertion of some common right, or the redress of some common injury, are all spoken of, in general terms, as affording a ground of contribution in favor of one co-tenant, and against another,” limited, it may be, to “the declaration and enforcement of a lien against the property,” and not to be established as a personal liability for which a recovery could be had as upon an implied *assumpsit*.—*Freeman Co-Ten. and Part.* § 263; *Newbold v. Smart*, 67 Ala. 326.

This right of contribution exists, Mr Story says, “for all charges and expenditures incurred for the common benefit.” 1 Story’s Eq. § 505. It is not founded upon express contract, but, like a vendor’s lien, it is an equity originating from the nature of the transaction. True, it arises incidentally from contract; but the equity itself is implied from the relationship of the parties, and the character and necessity of the duty performed for which compensation or contribution is claimed. It has been pronounced “a general equity, founded on the equality of burdens and benefits.”—*Screven v. Joyner*, 1 Hill’s Ch. 260. In *Rankin v. Black*, 1 Head (Tenn.), 650, which was a joint purchase of land, and an unequal payment of the purchase-money, it was said, that “where the adventure is joint, each is entitled to participate equally in profit or loss, without regard to equality in payment. But it is a clear principle of equity, that the common property will be bound for any excess paid by one over the other. It is analogous to the law of partnership, by which, as between the partners, the capital must be returned out of the partnership effects, before the profits can be divided.” This underlying principle, governing the liabilities of tenants in common, is fully discussed and recognized in *Newbold v. Smart*, 67 Ala. 326, where many cases are cited in full support of the doctrine.

Under these principles, the joint fund realized as compensation by the commissioners would be chargeable for any moneys advanced by one of the part-owners for the common benefit of all; the share of each being charged with the amount received by him, in excess of what he has paid out for like common benefit, on account taken as in ordinary cases of partnership dealings.

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We do not think the heirs of Houston can claim any more than *his rights* in the litigated fund, apart from any consideration of the statutes of *limitation* and of *non-claim*. The act of December 17, 1873 (Acts 1873, pp. 65-67), authorizing "the legal representatives or heirs" of Houston to unite with the other commissioners in their bill against the State, was purely remedial, and was not intended to create or confer any new right. When they recover their proportionate part of the fund, they must take it *cum onere*—charged with all incumbrances, if any, created by their ancestor, and not discharged by operation of law, or the act of the parties.

The claim in question does not appear, from the averments of the bill, to have been barred by the statute of limitations, or to come within the class of demands usually designated as *stale*. The moneys are alleged to have been advanced by the complainant, to aid in carrying out the joint adventure—the execution of the official duties imposed by the statute creating the agency. The further averment is made, that these moneys "were to be refunded to him out of the compensation to be received from the State." This compensation was not received or collected until some time in the year 1878; and until then it is manifest that complainant's claim did not accrue, and no right of action could, therefore, vest in him prior to that time. Hence, the statute did not commence to run until within less than one year before the present bill was filed.

The question of *res adjudicata* we leave undecided, as from the face of the bill, and without some proof, we can not clearly see that the matters here litigated were either actually decided, or necessarily involved, in any previous suit or proceeding between the same parties.—*McDonald v. Mobile Life Ins. Co.*; 65 Ala. 358.

The decree of the chancellor dismissing the bill was erroneous, and must be reversed, and the cause will be remanded.

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Special Action on the Case for Damages, by Landlord against Purchaser of Tenant's Crop with Notice of Lien.

1. *Landlord's relation to sub-tenant.*—At common law, there was no privity of estate or contract between the landlord and the under-tenant of his lessee, nor could he maintain any action against such under-tenant for the recovery of rent.

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2. *Landlord's statutory lien and remedies against crop.*—By statutory provisions (Rev. Code, §§ 2961–63), since modified in the interest of sub-tenants (Code, § 3476), a lien was given to the landlord, for the rent of the current year, on the entire crops raised on the rented premises, whether raised by the tenant or by a sub-tenant; but this lien was given to the landlord for his own protection, and he can not be compelled to so exercise his statutory right as to protect or benefit another person who may have a lien on the crop of the under-tenant.

3. *Same; discharge of levy on crop of under-tenant.*—The landlord having sued out an attachment to enforce his statutory lien on the crops, and having afterwards released the levy on the crops of under-tenants who had paid their rent to their immediate landlord, he does not thereby forfeit or impair his right to subject other portions of the crop, or to proceed against a third person who, having knowledge or notice of his lien, has received and sold a portion of the crop; and having brought an action on the case against a merchant who, having made advances to the under-tenants, had received and sold some of the crops raised by them, the latter has no right to insist that the demand shall be credited with the value of the crops so released from the levy of the plaintiff's attachment for rent.

4. *Apportionment of rent and statutory lien.*—Under an entire contract for the rent of a plantation and a ferry appurtenant to it, at an aggregate price, the rent and statutory lien can not be apportioned.

APPEAL from the City Court of Montgomery.
Tried before the Hon. THOS. M. ARRINGTON.

WILLIAMSON & HOLTZCLAW, for appellants.

D. CLOPTON, *contra*.

BRICKELL, C. J.—The plaintiff, on the 7th day of February, 1873, rented to Robert Y. Ware and Mrs. Asenath A. Ware, for the current year, a plantation and ferry, for the aggregate sum of fifteen hundred dollars, payable on the ensuing first day of December; taking a mortgage on several mules, and the crops to be grown on the plantation during the year, to secure the payment of the rent. The tenants entered into possession, and underlet to one Robert Y. Ware, jr., who also underlet to other tenants, and made crops of corn and cotton on the plantation. At different times during the year, to enable Robert Y. Ware, jr., to cultivate the crops, he and Robert Y. Ware, the tenant in chief, obtained advances from the defendants, Lehman, Durr & Co.; giving them mortgages on the crops to be grown and cultivated, to secure the payment of such advances. In November, 1873, Robert Y. Ware, jr., delivered to the defendants, to be applied to the satisfaction of the mortgages, sixteen bales of cotton which had been grown on the plantation; nine bales of which he had raised, and seven bales of which he had received from his tenants for rent and advances. In December, 1873, the plaintiff, claiming a landlord's lien for rent, sued out an attachment against his lessees,

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which he caused to be levied on corn and cotton belonging to the under-tenant, Robert Y. Ware, jr., and also on corn and cotton belonging to his tenants, all of which had been raised upon the rented plantation. The corn and cotton belonging to Robert Y. Ware, jr., was sold under the attachment, producing three hundred and fifty dollars, which was applied to the payment of the rent. The corn and cotton belonging to his tenants, which was levied upon, and was of sufficient value to have paid the balance of the rent due to the plaintiff, he released to such of the tenants to whom it belonged as remained upon the plantation the ensuing year, whether they had or had not paid to Robert Y. Ware, jr., the rent and advances due him from them. The rental value of the plantation, exclusive of the ferry, was one thousand to twelve hundred dollars; and of the ferry alone, was from three to five hundred dollars. The action is case, to recover of the defendants the value of the sixteen bales of cotton received by them and sold, thereby rendering unavailing the lien of the plaintiff for the payment of the rent due him.

The City Court instructed the jury, that if the attachment sued out by the plaintiff was levied upon crops raised upon the plantation, of value sufficient to pay the rent, and he released a part thereof from levy, the value of the part released must be deducted from the rent due him, although it belonged to under-tenants who had paid their rent to their immediate landlord. The court also instructed the jury, that the plaintiff had a lien on the crops, only for the payment of so much of the aggregate rent as was the fair rental value of the plantation, exclusive of the rental value of the ferry. The court refused, on the request of the plaintiff for instructions to the jury, to instruct them that the defendants had no right to complain that he had released to the under-tenants, who had paid their rents to their landlord, such parts of the corn and cotton levied upon as belonged to them. These rulings of the City Court are now assigned as error.

The statute of force when these transactions occurred gave to the landlord a lien on the crop grown on rented premises, for the rent of the current year.—Rev. Code, §§ 2961–63. The lien extended to the entire crop raised on the premises, whether it was the product of the labor of the original lessee, or of under-tenants leasing from him.—*Givens v. Easley*, 17 Ala. 385. There was not then, as there is now, a statutory provision requiring the landlord to exhaust the crops of the original lessee, before resorting to and subjecting the crops of the under-lessee. The liability of the crop of the under-tenant to pay the rent of the original lessee was purely and strictly statutory. For, by the common law, between the lessor and the tenant of his lessee

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there was neither privity of estate, nor of contract, and for the recovery of rent the lessor could maintain no action against the under-lessee. When he paid rent to his immediate landlord, he was discharged from all liability.—Taylor Land. & Ten. § 484. The purpose of the statute was not to fix upon the under-lessee a personal liability for the rent owing by his immediate landlord, but the primary appropriation of all crops grown on the rented lands, to the payment of the rent accruing for the current year, without regard to the ownership of the crops, or the agencies employed in producing them. The lessor had the option, now qualified by statute, to proceed and charge the crop of his own tenant, or of the under-tenant, or to proceed and charge both crops indiscriminately. The option was given simply to secure to him the payment of the rent issuing out of the premises. But what of reason or justice is there in compelling him to an exercise of the option so that other creditors may be let in to enforce subordinate liens or charges upon the crops of the original lessee? If the under-lessee had paid rent to his landlord,—and that is the predicate of the instruction requested by the appellant,—it would be simple injustice to compel the original landlord to proceed against his crops, for the exoneration of the crops of the original lessee; an injustice a court of equity would prevent, if the crop of the original lessee was sufficient for the payment of the rent. Or, if the under-lessee has not paid his rent, upon what principle can the landlord be compelled to pursue his crop, to make room for the admission of other creditors of the original lessee to charge his crops?

The principle is general and equitable, that if a creditor has a lien on, or interest in two funds, as a security for his debt, and another creditor has a lien on or interest in one of them only for the security of his debt, he who has the security of the two funds shall not unnecessarily so exercise his right of recourse upon them as to disappoint him who has the security of one only. The principle is, of itself, a pure equity, founded on high considerations of justice, and is never applied so as to work injustice. In its operation, it is confined to cases where two or more persons are creditors of the same debtor, and have successive demands upon the same property, the one prior in right having other securities. It has no application as between creditors of different persons.—1 Story Eq. §§ 633, 641-43. "We have gone this length," said Lord Eldon, in *Ex parte Kendal* (17 Vesey, 520), "if A has a right to go upon two funds, and B upon one, having both the same debtor, and the funds are the property of the same person, A shall take payment from that fund to which he can resort exclusively, so that both may be

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paid. But it was never said, that if I have a demand against A and B, that a creditor of B shall compel me to go against A, without more. If I have a demand against both, the creditors of B have no right to compel me to seek payment from A, if not founded in some equity, *giving B, for his own sake*, as if he were surety, &c., a right to compel me to seek payment of A. It must be established that it is just and equitable that A *ought to pay in the first instance*, or there is no equity to compel a man to go against A, who has resort to both funds." And upon this basis, the doctrine is established in this country.—2 Lead. Cases Eq., 4th Am. ed. 273; *Dorr v. Shaw*, 4 Johns. Ch. 17; *Reynolds v. Tooker*, 18 Wend. 591.

The appellees were not creditors of the under-tenants, nor had they any lien upon the crops which were raised by them. The lien of their mortgage extends to and embraces only the crops of the original lessee, and there is no justice in their claim that the crops of the under-tenants should be charged primarily with the payment of the rent due from the original lessee, that they may be paid. The City Court erred in the first instruction given the jury, and in the refusal of the one requested by the appellant.

It is insisted, however, that although there may be error in the giving and refusal of these instructions, it is error without injury, as it appears that the appellant had not the lien of a landlord, but the right and title of a mortgagee, and the present action is therefore misconceived. The answer is, that the record does not show this point was made in the City Court; and it is clear that it had no influence in inducing the rulings of the court we have pronounced erroneous. Under these circumstances, it would not be just, if this proposition is well founded, now to make it the ground of affirmance.—*Cotton v. Thompson*, 25 Ala. 671.

The lien given the landlord was by the statute limited to the rent of the premises upon which the crops were raised—it did not extend to the rent of other premises, or to any other debt or demand. If the ferry had been rented separately from the plantation; or, if in the contract of renting a distinct rent had been fixed upon it, from that fixed upon the plantation, and a single obligation taken for the aggregate rent; if the lien of the landlord was not thereby discharged, it may be the second instruction given by the City Court would assert a correct legal proposition. The contract of renting was, however, entire—for the plantation and ferry, the ferry passing to the lessee as a mere appurtenance to the plantation. It may have enhanced the rent, as improvements upon the plantation would have enhanced it; but there is no principle upon which the rent can

[Patterson v. Kicker.]

be apportioned, and the rental value of the ferry separated from the rental value of the plantation.

The judgment of the City Court must be reversed, and the cause remanded.

Patterson v. Kicker.

Statutory Detinue for Mule.

1. *Possession as evidence of title.*—The possession of personal property is *prima facie* evidence of title, or ownership; and this principle applies to personal property belonging to the wife, whether the possession be in her, or in her husband as her trustee, or in both jointly in recognition of her right.

2. *Presumption as to character of wife's estate.*—As a rule of evidence, personal property in the possession of the wife, or in the possession of her husband as trustee for her, or in their joint possession, will be presumed to be held as part of her statutory estate, under the laws which have now been of force for more than thirty years, unless affirmatively shown to be an equitable estate.

3. *Proof of title to personalty by writing.*—Although a recovery of personal property may be had on proof of possession, in the absence of countervailing evidence; yet, if the plaintiff undertakes to prove title by a written instrument, he must produce it, or satisfactorily account for its non-production; and if the instrument is produced, and has attesting witnesses, its execution can not be proved by a third person.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JAMES E. COBB.

This action was brought by Mrs. Elizabeth Patterson, against J. A. Kicker, to recover a mule named *Gray*, with damages for its detention; and was commenced on March 20th, 1882. On the trial, in consequence of adverse rulings of the court on the evidence, the plaintiff took a nonsuit, with a bill of exceptions, in which the facts are thus stated: "The plaintiff introduced as a witness her husband, J. Patterson, who testified that, at the time of their marriage, which occurred since 1852, plaintiff was possessed in her own right of a mare, which had been given to her by her father; that said mare afterwards had a horse colt, which was raised by witness and his wife, and which, in December, 1881, after it was grown, he exchanged with one J. R. Beard for two mules, one of which is the mule here sued for; that he did not, at the time, disclose to said Beard that the horse belonged to his wife, and no writings were executed between them; that afterwards, when Beard discovered the ownership of the property, he executed the paper marked *Exhibit Vol. LXXII.*

[Patterson v. Kicker.]

A; that he (witness) carried the two mules home, and showed them to his wife (plaintiff), who made no objection to the trade, and has never repudiated the same; and that said Beard still retains said horse. Plaintiff then offered to show, by parol evidence, that soon after said exchange was made, and after plaintiff had seen said mules, and had consented to the exchange, she executed to said J. R. Beard, jointly with her husband, in the presence of two witnesses, a bill of sale for said horse, and delivered the same to said Beard, and had not seen it since. The court refused to allow plaintiff to make such proof, and plaintiff duly excepted to this action of the court. Plaintiff then offered in evidence said paper writing marked *Exhibit A*, accompanied by proof, by said witness, J. Patterson, that said paper was executed by said J. R. Beard, and that one of the mules mentioned therein was the mule sued for in this action. Defendant objected to the introduction of said paper as evidence, on the ground that the same purported to be attested by two witnesses, and neither of said attesting witnesses now appeared to prove the execution of said paper. Thereupon, the court refused to allow said paper to be read in evidence; to which action of the court the plaintiff duly excepted." *Exhibit A*, mentioned above, is a bill of sale for two mules, sold by J. R. Beard to Mrs. Elizabeth Patterson; being without date, and attested by J. R. Burnett and A. P. Johnson as witnesses. These rulings of the court are now assigned as error.

GUNTER & BLAKEY, for appellant.

J. M. FALKNER, *contra*.

SOMERVILLE, J.—The legal principle is one of common learning, that possession of personal property is *prima facie* evidence of title, or ownership.—2 Whart. Ev. § 1331; *Sparks v. Rawls*, 17 Ala. 211; 1 Brick. Dig. 806, § 37. There is no reason why the title of the wife, to property owned by her, can not be proved in the same manner, as that owned by one *sui juris*. It is well settled, that the possession by the husband, of property belonging to the wife's statutory separate estate, is referable to his representative capacity as trustee. The fact of a joint possession, therefore, can not complicate the principle in the simplicity of its application.—*Brunson and Wife v. Brooks*, 68 Ala. 248; *Gwynn v. Hamilton*, 29 Ala. 233.

It was no doubt competent for the plaintiff to prove, by oral evidence, her ownership of the mule for the recovery of which the present action was brought. The possession of the property by herself, or by her husband in recognition of her title, or by both jointly claiming it as her property, would be presumptive

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evidence of such ownership. "All property of the wife," the statute provides, "held by her *previous* to the marriage, or which she may become entitled to *after* the marriage, *in any manner*, is the separate estate of the wife."—Code, 1876, § 2705; Const., 1875, Art. x, § 6. All property held under the provisions of this statute, is the statutory separate estate of the wife; and to take a given case out of its influence, words are required clearly indicating an intent to exclude the marital rights of the husband.—*Short v. Battle*, 52 Ala. 456; *Smith v. McGuire*, 67 Ala. 34. In view of the fact that the present system, creating separate estates in married women, has now been in force in this State for over a third of a century, it is safe to assert that all property owned by married women may be presumptively considered as held by them under the statute of the State, until the contrary is shown. The statute is broad and comprehensive, and may be taken as the general rule of property tenure. The *exception* to the rule is found in the other class of separate estates called equitable, and which are created by contract. This, it is needless to say, is a rule of evidence, and not of pleading.

Under the influence of these principles, it was competent for the plaintiff, as above stated, to prove her possession of the property in question, as *prima facie* evidence of her title; and such title would presumptively be the ownership of a statutory separate estate, liable, of course, to be rebutted by countervailing evidence. But, if the plaintiff insisted on going further, by proving title by written conveyance, such writing should have been proved according to the established principles of evidence, which required its production, or else the proof of its loss or destruction, in order to let in secondary evidence of its contents. The familiar case cited in all the books is the fact of tenancy, which may be proved orally by the payment of rent, although there be a written contract between the landlord and tenant; yet the contract itself must be produced, if it is sought to prove the tenancy through medium of it, or to establish the terms of the instrument.—1 Greenl. Ev. § 87; 1 Whart. Ev. §§ 77-78; Powell's Ev. (4th ed.) 63; Roscoe's Cr. Ev. (7th ed.) pp. 6-7, notes (1) and (2).

There is no error in the rulings of the court on the evidence, and the judgment is affirmed.

Winter v. Banks.

Bill in Equity to enforce Vendor's Lien on Land.

72	409
122	502

72	409
123	682

72	409
139	201

1. *Revision of chancellor's rulings on exceptions to register's report.*—On appeal from the chancellor's decree overruling exceptions to the register's report upon matters of account, dependent upon the register's conclusions from the evidence adduced before him, this court will indulge all reasonable presumptions in favor of the register's rulings, and will not disturb them unless they are clearly shown to be wrong.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. JOHN A. FOSTER.

The original bill in this case was filed on the 29th January, 1880, by Thomas Banks, against John Gindrat Winter; and sought to enforce an alleged vendor's lien on a tract of land, for a balance of the purchase-money due by the terms of the written contract between the parties. Banks was in possession of the tract of land at the time he agreed to sell to Winter; but a bill in chancery was then pending against him, in favor of the personal representative of R. D. Gregg, deceased, involving the title to the land (the case being reported as *Grigg v. Banks*, 59 Ala. 311). By the terms of the contract between the parties, as reduced to writing, and signed by both parties, a copy of which was made an exhibit to the bill, the agreed price was \$4,000, of which \$2,000 was paid in cash, and the purchaser gave his two notes, for \$1,000 each, with interest, for the residue; and the contract contained a further stipulation, that the future costs of the suit, and the fee of said Banks' solicitor for future services in the pending suit, should be paid by said Winter. The contract contained further stipulations, as to the retention of possession by Banks, the cultivation of parts of the land under a lease, and the division of the crops; but these stipulations are not material, as the case is here presented. The bill alleged that the greater part of the last note, between \$500 and \$1,000, was still unpaid, with solicitor's fees and costs which the defendant had agreed to pay; and sought to subject the land, by sale, to the payment of this amount. An answer was filed by the defendant, insisting that the defendant had received, in partial payments, and the proceeds of crops received and sold by him, more than the amount due on the notes given for the purchase-money; and denying that the complainant had paid or assumed any costs or solicitor's fees for

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which, by the terms of the contract, the defendant was liable. The defendant having transferred his interest in the land and the contract, before the filing of the bill, to Mrs. Mary E. Winter, she was brought in as a defendant by an amended bill, and filed an answer setting up, in substance, the same defenses. The chancellor ordered a reference to the register as to the matters of account, and each party reserved exceptions to the register's report. The account, as stated by the register, showed a balance of \$693.55 due to the complainant, with interest from April 15th, 1882; and the chancellor confirmed his report, with some trifling alterations, overruling the exceptions of each party, on the authority of *Lehman v. Levy* (69 Ala. 48), on the ground that the evidence did not clearly show error in the register's conclusions. The defendants appeal from this decree, and here assign as error the overruling of their several exceptions to the register's report.

GUNTER & BLAKEY, for appellants.

D. CLOPTON, and RICE & WILEY, *contra*.

BRICKELL, C. J.—The assignments of error refer only to the one ruling on exceptions to the report of the register upon matters of account between the parties. On appeal from a decree of the chancellor, overruling exceptions to the report of the register on questions and matters of account dependent upon the conclusions drawn by the register from evidence produced before him, all reasonable presumptions are indulged to support his rulings, and they will not be disturbed unless shown to be clearly wrong.—*Kinsey v. Kinsey*, 37 Ala. 393; *Mahone v. Williams*, 39 Ala. 202; *Lehman v. Levy*, 69 Ala. 48. After a careful examination, we are not prepared to pronounce them erroneous.

The first exception refers to the allowance of the fee paid by Banks to solicitors, for services rendered in the suit of *Greyy v. Banks*. The liability of Winter to pay the fee, if it was compensation for services rendered after he entered into the contract of purchase, can not be denied. The evidence showing that it was for such services, and not for antecedent services, may be meagre; but yet it had a tendency to prove the fact, and was the only evidence upon the point which was introduced. If the fact were otherwise, and the fee included services rendered prior and subsequent to the contract of purchase, the evidence of it could have been produced by the defendants. As they offered no evidence upon the point, we can not say the register erred in concluding that the fee was, under the contract, properly chargeable to Winter.

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The matter of exceptions seems to have been very fully and carefully examined and considered by the chancellor, and we are satisfied with his conclusions. It is not clearly and satisfactorily shown that the register erred in any of the rulings to which the exceptions are directed, and they ought not to have been disturbed.

Affirmed.

STONE, J., not sitting.

City Council of Montgomery v. Wright.

Action for Damages against Municipal Corporation, for Personal Injuries caused by Defects in Streets.

1. *Judicial notice of municipal charter.*—The charter of a municipal corporation is a public statute, of which the courts will take judicial notice.

2. *Averment of corporate character and name.*—In an action against a municipal corporation, described by its corporate name, it is not necessary to aver in the complaint that the defendant is a body corporate, since the court will take judicial notice of that fact, and of the identity of the defendant as such corporation.

3. *Averment of corporate duty to keep streets and side-walks in repair.* When the duty of keeping "the streets and highways in repair" is imposed on a corporation by its charter, it is only necessary to aver the existence of this duty by way of inducement, when declaring against the corporation for damages resulting from its breach; and this is done with sufficient certainty by the general allegation, "which the defendant is bound to keep in repair."

4. *Action against municipal corporation, for damages; notice of defect in street or side-walk.*—To maintain an action against a municipal corporation for damages, on account of injuries resulting from its failure to keep the streets and side-walks in proper repair, the plaintiff must aver and prove actual notice of the defect in the street or side-walk, or facts from which constructive notice will be inferred; and such constructive notice may be inferred from the notoriety of the defect, and its continuance for such length of time as to raise the presumption that the proper municipal officers did in fact know, or with due vigilance and care ought to have known it.

5. *Duty to keep streets and side-walks in repair.*—The duty of keeping its streets and side-walks in repair, when imposed by statute on a municipal corporation, is unquestioned, and may exist without express statutory provision; and this duty extends to the whole width of those thoroughfares, and requires that they shall be kept in proper condition for safe travel by night as well as by day.

6. *Negligence; when question of fact, or of law.*—When the facts are disputed, or when different conclusions may be drawn from the undisputed facts, negligence *vel non* is a question of fact for the determination of the jury; but, when the facts are undisputed, and the inference to be drawn from them is clear and certain, it is a question of law.

72	411
86	438
72	411
101	570
72	411
105	176
72	411
108	52
109	229
109	615
72	411
113	366
72	411
119	593
72	411
128	540
72	411
132	547
72	411
137	209

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7. *Contributory negligence; when not imputed to plaintiff.*—When the evidence shows that the route selected by plaintiff, at the time he was injured by a fall caused by a “wash-out” in the side-walk, was the route ordinarily travelled with safety by all persons on foot going in that direction, that the side-walk at that point was wide enough for safe passage on the inside of the “wash-out,” and that there was no side-walk on the other side of the street; contributory negligence can not be imputed to him, because he had knowledge of the defect in the side-walk, and did not select a different route.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JAMES E. COBB.

This action was brought by William Wright, against “the City Council of Montgomery,” without other descriptive words; and was commenced on the 5th November, 1881. The complaint was in these words: “The plaintiff claims of the defendant ten thousand dollars as damages, and plaintiff avers that there is in the city of Montgomery a public highway, called *Bell* street, leading from *Goldthwaite* street in said city west to the corporate limits thereof, which the defendant is bound to keep in repair; and that that portion of the north side of said *Bell* street, lying between *Holt* and *Hanrick* streets, was negligently suffered by the defendant to be out of repair, whereby plaintiff, travelling therein, and using due care, on, to-wit, the night of October 22d, 1881, was hurt; to plaintiff's damage as aforesaid, and therefore he sues. And plaintiff claims of defendant the further sum of ten thousand dollars as damages; and plaintiff avers that it was the duty of defendant to keep the streets of the city of Montgomery in repair, but that it negligently suffered a street in said city, called *Bell* street, to be and remain in bad repair, and unfit for the safe use of citizens and others in walking along the same, for a long space of time; and especially that it negligently suffered the side-walk on the north side of said street, at a point between *Hanrick* and *Holt* streets, to be and remain in such bad repair that the same was dangerous in its use in walking, by reason of a hole so left by it in the edge of said side-walk, about five feet from the north edge thereof, and more than two feet in depth, and in the part commonly used by those walking along said street; and that while plaintiff was walking along said street and side-walk, carefully and prudently, on the night of October 22d last, he, without fault or neglect of his own, stepped with one foot into said hole so negligently let and suffered by defendant to remain in said side-walk, and, by reason thereof, fell with great violence; whereby he was caused great pain and suffering, for a long time, and was permanently injured and disabled from the performance of his work, and has become liable for a large sum of money for nursing, medical attendance and medicines, necessary to relieve his pain, injury and suffering sustained by said fall; all of which

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was suffered by reason of defendant's negligent failure to keep and maintain street in proper repair for the safe use of citizens and others, as it was its duty to do; to plaintiff's damage," &c.

The defendant demurred "to the complaint, in short by consent," on the following grounds as specified: 1st, "because the complaint does not show that the defendant is a corporation;" 2d, "because the complaint does not show that it was the defendant's duty to keep said street or side-walk in repair;" 3d, "because the complaint does not aver facts showing that it was defendant's duty to keep said street or side-walk in repair;" 4th, "because the complaint does not show that *Bell* street is a street established by defendant;" 5th, "because the complaint does not aver or show that said street or side-walk was suffered to remain out of repair for an unreasonable time." The court overruled the demurrer, and the defendant then pleaded, "in short by consent—1st, the general issue; 2d, want of ordinary care by plaintiff; 3d, contributory negligence by plaintiff." The trial was had on issue joined on these several pleas.

On the trial, a bill of exceptions was reserved by the defendant, in which the facts are thus stated: "The plaintiff offered evidence tending to show that *Bell* street was a street in the city of Montgomery laid out by the defendant, having a roadway of some fifty feet in width, and a side-walk for foot passengers, laid out and worked by the city, only on the north side of the street at the point where the injury occurred; that no side-walk was laid out or worked by the city on the south side of said street for some distance above and below the said point; that the said side-walk on the north side was laid out about ten feet wide, and was of that width for some distance above and below that point, but had been washed down to a width of about seven feet for several feet above and below that point; that this side-walk was situated some three feet, or more, above the roadway; that at a point on said side-walk about midway between *Holt* and *Hanrick* streets, there was a *wash-out* on the outer edge of said side-walk, about eighteen inches wide, extending about two feet into the side-walk, and about three feet deep, down to the level of the road; that this *wash-out* had been in existence, in the same condition, for more than two years; that the distance from the inner edge of the *wash-out* to the fence on the northern edge of the side-walk was from five feet six, to five feet eight inches; that along the side-walk, at points east and west of this *wash-out*, was a beaten path, or foot-way, made by persons walking singly, which passed near to the outer edge of the side-walk, but next to and within the inner edge of the *wash-out*; that this was the only foot-way, and it was universally used as a foot-way by all persons coming into or going out from the city along *Bell* street, which was one of the prin-

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cipal streets used by persons going out of the city towards the west, or coming into it from the country adjacent to the city on the west; that the space between the *wash-out* and the fence on the north was about five feet and six or eight inches; and that the space between said path and the fence, some eighteen inches or two feet, was grown up with grass, being unused and untrodden, and sloped up towards the fence, so as to render it inconvenient to walk on it. He offered evidence, also, tending to show that not only was there no side-walk worked by the city on the south side of the street, but that the space for the side-walk, inside of the road-way, was not practicable for persons walking, and was never used by them; also, that on October 22d, 1881, he went to visit a friend who lived on the south side of *Bell* street, a square or two beyond the point of the *wash-out*, and passed along the street and side-walk on the north side of the street, passing said *wash-out*, as he frequently did in visiting his said friend; that this was in the afternoon, and in the day-light, and he then saw the condition of said side-walk; that he remained at his friend's house until it was nearly dark, and then set out to return home in the city; that it began to rain, and was very dark; that he crossed over to the north side of the street, and ascended to the embankment of the side-walk by a bridge from the street, made for that purpose, at a point west of the *wash-out*, where the road-way was about eighteen inches below the side-walk, feeling with his stick before him for the *wash-out*, which he knew of, as there was no light, but, placing his cane beyond and across the edge of the *wash-out*, he stepped with one foot into the *wash-out*, and fell down, breaking his hip bone near the joint," and sustaining other serious injuries, which were particularly described. "Several witnesses testified, that they had seen the street hands often at work on the road-way, repairing it, but that no work had been done by them, for years, on the side-walk near the point indicated as the *wash-out*. The defendant showed that said *wash-out* was at a point near the suburbs of the city, within one hundred and fifty yards of its western limits, and introduced evidence tending to show that that part of the city was not thickly populated, nor greatly frequented by foot passengers; and introduced evidence tending to show that the road-way of *Bell* street was well repaired in the spring of the year 1881, and that a part of the side-walk on the north side of said street, several squares east of the *wash-out*, was put in good repair. The defendant's street overseer testified, that he had worked on the side-walk at the point indicated as the *wash-out*, but could not say when it was last done before the injury happened; that he did not remember he had done it in the spring of 1881, but had repaired it, and filled up the said *wash-out*, after the injury happened. The defendant

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introduced, also, evidence tending to show that the whole space between the *wash-out* and the fence, some five feet six to eight inches, was level, and reasonably safe for walking; also, that though no side-walk was laid out on the south side of the street, yet on the south side, from the house which plaintiff left to come into the city, there was a safe and practicable foot-way, along which persons could and did safely walk, coming in the direction which plaintiff came, and which extended to a point some distance beyond and east of said *wash-out*; and that a path crossed the road-way thence, to a point on the side-walk north where it was safe and level, and well worked all the way into the heart of the city. There was no evidence of notice to the defendant, or its officers, of any defect in the said side-walk, and the street overseer testified that he did not know its condition; but there was evidence, also, tending to show that it was in the same condition for months, as before stated, and that the street hands had worked the road-way, while in that condition, without working the side-walk at that point.

"This was all the evidence," and the court thereupon gave the following charges to the jury, at the instance of the plaintiff:

1. "That it is the duty of the corporation to keep the streets of the city in repair; and this includes the side-walks for persons on foot, as well as the road-ways; and it is no answer to a complaint for injury caused by a defect in the side-walk, that there was a sufficient space thereon by which a safe passage might have been made, unless the injury might have been avoided by proper prudence on the part of the person injured, or unless negligence can be imputed to him as contributing to cause the injury." 2. "That the attempt of a visitor to a friend in the city to walk home at night, on a side-walk which has been left in bad repair by the city, and which is in the same condition in which it has been kept for months, and which is the only one in the city used by all persons having occasion to go in that direction, is not negligence in him; and if a person so walking is injured, by reason of a defect in the side-walk, he is entitled to recover damages, unless his negligence in walking contributed to the injury." 3. "That it is as much the duty of the city to keep the side-walks in the suburbs of the city in a safe condition for the use of passengers, as those in the heart of the city; that while the authorities may have a discretion in the matter of elegance of pavements, or in the matter of pavements or no pavements, yet they have no discretion in the matter of safety; and it is an absolute duty to keep all the side-walks in the city in a reasonably safe condition for the use of passengers, whether in the body of the city or near its limits." To each of these charges an exception was duly reserved by the defendant, and they are now assigned as error,

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together with the overruling of the demurrer to the complaint.

CLOPTON, HERBERT & CHAMBERS, for appellant.—1. The complaint is fatally defective in several particulars. (a) It does not aver that the defendant is a municipal corporation, nor give its corporate name. The name of the corporation, as the court must judicially know, is the *City of Montgomery*; and although the corporation may sue or be sued by the name of its city council, the complaint must aver that the suit is so brought, thereby showing that the corporation is the real defendant. (b) The complaint should aver, also, that the duty of keeping its streets in repair is enjoined on the corporation by its charter, or should set out the special powers granted, so that the court may see that the duty is devolved upon it. In this country, there is no common-law obligation resting on such corporations to keep their streets and highways in repair, and it only exists by statute.—2 Dill. Mun. Corp. § 785. The only averment of the complaint on this point—"which the defendant is bound to keep in repair"—is merely inferential, or the statement of a conclusion, and is wholly insufficient. (c) The complaint neither avers notice of the defect to the corporation, nor states facts from which notice may reasonably be presumed; and this was a necessary averment.—*Wightman v. Washington*, 1 Black, 39, 52.

2. The first charge given to the jury, at the instance of the plaintiff, is not direct and certain, but evasive, and calculated to mislead the jury; and is therefore erroneous.—*Cothran v. Moore*, 1 Ala. 423; *Solomon v. The State*, 28 Ala. 83. There was no obstruction, or structural defect, in the side-walk; and if the space between the *wash-out* and the fence was sufficiently wide, level and commodious, to enable persons to pass with safety and convenience by the exercise of ordinary care, this was a defense to the action.—*Campbell v. City Council*, 53 Ala. 624; Dill. M. C. § 789. This charge is obnoxious to the further objection, that it was calculated to mislead the jury as to the *onus* of proof on the question, whether the injury could have been avoided by proper prudence. Although contributory negligence is a defense, the *onus* of which is on the defendant; yet it was incumbent on the plaintiff to show, not only a defect in the side-walk, but that the defect rendered the side-walk unsafe and inconvenient for passage by persons using ordinary care.—*Pennington v. Woodall*, 17 Ala. 685.

3. The second charge given assumed as facts, that the side-walk was in bad repair, that it had been in the same condition for months, and that it was the only one used by all persons having occasion to go in that direction; as to which several matters there was conflicting evidence. The charge, therefore,

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invaded the province of the jury, and was erroneous.—*Skains & Lewis v. The State*, 21 Ala. 218; *McKenzie v. Br. Bank*, 28 Ala. 610; *McGonegal v. Walker*, 23 Ala. 361; *Henderson v. Marx*, 57 Ala. 169. It was erroneous, also, in instructing the jury that, as matter of law, on the facts stated, the plaintiff was not guilty of negligence. Negligence is, generally, a mixed question of law and fact; and it is not necessarily a question of law, whenever the facts are undisputed. Where the negligence consists in the failure to perform a clear legal duty, or where the conduct of all prudent men, under given circumstances, is so notoriously uniform that this uniformity becomes a rule of law, negligence *vel non* is a question of law; but, when the facts are doubtful or disputed, or, though undisputed, are such that reasonable men may fairly arrive at different conclusions, the inference to be drawn from them is a question for the jury, and the court has no power to determine it—*Detroit Railroad Co. v. Steinburg*, 17 Mich. 99, 118; *Penn. Railroad Co. v. Ogier*, 32 Penn. St. 71; *Briggs v. Taylor*, 28 Vermont, 183; *Ireland v. Oswego*, 13 N. Y. 533; *Railroad Co. v. Stout*, 17 Wallace, 657; *Patterson v. Wallace*, 1 McQueen's H. L. Cases, 748; *Beers v. Hous. Railroad Co.*, 19 Conn. 566. Again, notice of the defect to the defendant was necessary, to make out the plaintiff's case; and though notice may be inferred from other facts proved, it is an inference of fact to be drawn by the jury.—*Noble v. Richmond*, 31 Gratt. 271. As to the condition of the street, and the length of time the defect had existed, from which the inference of notice was to be drawn, the evidence was conflicting; and the charge was erroneous in ignoring the question of notice.

4. The plaintiff was not entitled to recover, unless he used ordinary care to avoid the accident; yet the charge restricts his duty to the exercise of ordinary care in walking—"unless his negligence *in walking* contributed to the injury." For this reason, the charge is erroneous.—*Dill v. Camp*, 22 Ala. 249. The plaintiff had full knowledge of the defect in the side-walk, and saw its condition when he passed in the afternoon; and in attempting to pass it in the dark, when he might have passed with safety and convenience along the path-way on the south side, he did not use ordinary care, and took on himself all risk of accident.—*President v. Dusouchett*, 2 Indiana, 586; *Bruker v. Covington*, 69 Indiana, 33; *Richmond v. Courtney*, 32 Gratt. 792. Knowledge of a defect in a highway is not, generally, conclusive evidence of negligence in attempting to pass it; yet, if the defect is such that a person of ordinary prudence, having knowledge of it, would not under the circumstances attempt to pass it, then the plaintiff was not justified in attempting to do so.—*Reed v. Northfield*, 13 Pick. 94; *Thomas v. Telegraph*

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Co., 100 Mass. 156; *Fox v. Glastenburg*, 39 Conn. 204; *Hubbard v. Concord*, 35 N. H. 52. Whether the plaintiff exercised ordinary care in remaining at his friend's house in the suburbs of the city until nearly dark, knowing that he would pass on his return over a defective side-walk, and in crossing from the south to the north side of the street, when it was so dark that he could not see the defect, and might have avoided it by continuing along the footway,—should have been submitted to the jury, and was withdrawn from their consideration by this charge, which limited their inquiry to negligence or care in the single matter of walking along the side-walk.

SHAVER & HUTCHESON, with whom was H. C. SEMPLE, *contra*.

1. The charter of the city of Montgomery is a public statute, of which the courts will take judicial notice.—*Smoot v. Wetumpka*, 24 Ala. 112; *Case v. Mobile*, 30 Ala. 538. The charter expressly provides, that the corporation may sue and be sued by the name of the "City Council of Montgomery," the name by which it is here sued; and it enjoins on the corporation the duty of keeping its streets in repair, as this court has decided. *Campbell v. City Council*, 53 Ala. 528; *City Council v. Gilmer & Taylor*, 33 Ala. 116; also, *Smoot v. Mayor of Wetumpka*, 24 Ala. 112; 2 Dillon's Mun. Corp. § 1017. These facts being judicially known, it was not necessary that they should be averred in the complaint; and the general averment—"which the defendant is bound to keep in repair"—conforms to the precedent from which the count was copied.—Chitty's Pleadings, by Perkins, 16th Amer. ed., 575. Express notice to the corporation, of the defect or obstruction in the street or highway, is only required where the defect has suddenly happened, as by the falling of a tree in the night, and sufficient time has not elapsed to discover it; and in all other cases, it is sufficient to aver, as here, long continuance of the defect, or other facts from which notice will be inferred.—*Ward v. Jefferson*, 24 Wisc. 342; *Rockford v. Hildebrand*, 61 Illinois, 155; *Chicago v. Fowler*, 60 Illinois, 322; *Springfield v. Doyle*, 76 Illinois, 202; 2 Dill. M. C. § 790. For these reasons, and on these authorities, the complaint was sufficient, and the demurrer to it was properly overruled.

2. The first charge of the court, given at the instance of the plaintiff, asserts the proposition, that the duty of keeping the streets and side-walks in a safe and convenient state of repair, extends throughout their whole width. This proposition is manifestly correct, and is fully sustained by authority:—*Shear. & Redf. on Negligence*, § 385; *Hall v. Manchester*, 40 N. H. 410; *Bacon v. Boston*, 3 Cush. Mass. 174. In this case last cited, the street was forty feet wide, and the defect extended only

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fourteen inches into the side-walk, leaving ample space for safe passage by the side of it; but the court held that this was no defense to the action. If the charge was not clear and explicit, or was calculated to confuse or mislead the jury, an explanatory charge should have been asked.—1 Brick. Dig. 344, §§ 129-30.

3. The second charge given was supported by the evidence adduced by the plaintiff, and it was his right to request instructions based on that view of the evidence which was favorable to him.—*Connerly v. P. & M. Ins. Co.*, 66 Ala. 444; *Garrett v. Garrett*, 27 Ala. 687; *Wolf v. Parham*, 18 Ala. 441; *Farley v. Smith*, 39 Ala. 38. The facts were stated hypothetically, and it was competent to state them in that manner.—*Railroad Co. v. Jones*, 56 Ala. 507; and cases cited in 1st Brick. Dig. 336, § 14. The charge does not undertake to state what is negligence, but only that the facts recited do not, *per se*, constitute such negligence on the part of the plaintiff as would relieve the defendant of liability in this case. The substance of the charge is, that plaintiff, or any other person going in that direction, might lawfully and properly use the principal thoroughfare in that part of the city, and attempt to walk along the only side-walk of that street, although he knew there was a defect in it; and that ordinary care did not require that he should have selected another route. As to the correctness of this proposition, see *Erie City v. Schwingle*, 10 Har. Penn. St. 384; *Smith v. St. Joseph*, 45 Mo. 449; *Humphreys v. Armstrong*, 56 Penn. St. 204; *Trow v. Railroad Co.*, 24 Vermont, 487; *Railroad Co. v. Armstrong*, 52 Penn. St. 282. If the plaintiff was using ordinary and proper care at the time of the injury, his right of action can not be defeated because he imprudently attempted to pass along this side-walk, or failed to keep along the south side of the street, or to select some other route.—*Railroad Co. v. Donahue*, 75 Illinois, 106; *Railroad Co. v. Mason*, 51 Miss. 234; *Railroad Co. v. Elliott*, 28 Ohio St. 340; 11 Hun, N. Y. 333.

SOMERVILLE, J.—The charter of the city of Montgomery is a public statute, of which the courts will take judicial notice. It provides that the corporate authorities may sue and be sued by the name of "The City Council of Montgomery." The court must, therefore, judicially know the legal identity of the defendant corporation in this action with that of the municipality known as the City of Montgomery.—1 Dill. Mun. Corp. § 83; *Kelly v. Trustees A. & C. R. R. Co.*, 58 Ala. 489; *City of Selma v. Perkins*, 68 Ala. 145.

It is not required by the rules of pleading, that litigants should specially aver facts of which the courts commonly take judicial cognizance. Hence, it was unnecessary to allege in the

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complaint that the defendant was a body corporate.—2 Chitty on Plead. (16th Amer. Ed.) p. 13.

The city charter expressly devolved on the corporate authorities the duty of keeping "the streets and highways" *in repair*. It was only necessary to aver the existence of this duty, by way of inducement; and this was done with sufficient certainty in the complaint, by the general allegation, "which the defendant is bound to keep in repair."—*S. & N. Ala. Railroad Co. v. Thompson*, 62 Ala. 494, 500; *Ala. & Fla. R. R. Co. v. Walker*, 48 Ala. 459.

In order to maintain the present action against the defendant, it is true, as insisted by appellant's counsel, that the plaintiff must aver and prove express notice of the alleged defect in the highway, or facts from which it may be inferred that the corporate authorities were properly chargeable with *constructive notice*. It is well settled, on plain principles, that constructive notice of such defect "may be inferred from its notoriety, and from its *continuance for such length of time* as to lead to the presumption that the proper officers of the town [or city] did in fact know, or with proper vigilance and care might have known the fact."—*Reed v. Northfield* (13 Pick. 94), 23 Amer. Dec. 662; *Harriman v. Boston*, 114 Mass. 245; 2 Dill. Mun. Corp., 3d Ed., § 1024. The facts stated in the complaint were sufficient as an averment of implied or constructive notice.

In view of the foregoing principles, there was no error in overruling the demurrer interposed to the complaint, and the assignment of error based on this action of the court below will be overruled.

The duty of municipal corporations to keep their streets and side-walks in a reasonably safe state of repair for public use is unquestionable, when imposed by positive statute, and may often exist without it.—2 Dill. Mun. Corp. (3d Ed.), § 1017. This duty does not relate to a part, but extends to the *whole width* of these public thoroughfares. If any portion of a side-walk be negligently left in such condition as that pedestrians can not travel over it with reasonable assurance of safety, by night as well as by day, the municipal authorities may be chargeable with a neglect of this duty to its citizens, and the public generally.—*City of Chicago v. Robbins*, 2 Black, 418; *Shearman and Redf. Neg.* § 385; *Bacon v. Boston*, 3 Cush. 174. The first and third charges, given at the request of the plaintiff, were mere assertions of this principle, and were properly given.

It is insisted that the court erred in giving the second charge requested by the plaintiff, because it undertakes to judicially declare that it was not negligence *per se* for the plaintiff to pass over the side-walk in question at night.

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The question of negligence is always deemed one of fact, for the determination of the jury, in all cases of doubt, either where the facts are disputed, or where different minds may reasonably draw different inferences or conclusions. But it is a question of law, to be decided by the court, where the facts are undisputed, and the inference to be drawn from them is clear and certain. This, we think, is the sounder and better rule on the subject.—*Railroad v. Stout*, 17 Wall. 657; 2 Dill. Mun. Corp. (3d Ed.), § 1026. It is expressed by a standard author in the following words: "When the facts are clearly settled, and the course which common prudence dictated can be clearly discerned, the court should decide the case as a matter of law." Shear. and Redf. Negl. § 11. Negligence is said by Mr. Wharton to be a mixed question of law and fact, "to be decided as a question of law by the court, when the facts are undisputed, or conclusively proved, but not to be withdrawn from the jury when the facts are disputed, and the evidence is conflicting." Whart. on Neg. § 420, and cases cited.

The facts in this case are undisputed. The general width of the side-walk, over which plaintiff was walking when injured, was about ten feet, and at the immediate locality of the defect, or "wash-out," it was over seven feet. The *wash-out* was about eighteen inches wide, and encroached upon the outer edges of the side-walk about two feet, leaving between it and the fence a pass-way of about *five and a half feet*. The side-walk was elevated about three feet above the street, or road-way, and the *wash-out* extended from the top of the side-walk all the way down to the street. This defect had existed for many months, and was known to the plaintiff; and the route "was the *only one in the city used by all the people having occasion to go in that direction.*"

The defense interposed was *contributory negligence* on the part of the plaintiff, based upon an alleged want of ordinary care on his part. It would seem a legal truism to say, that it could not be deemed a want of ordinary care for the plaintiff to do what all other persons, similarly circumstanced, were in the constant habit of doing, without accident or injury to themselves, so far as is disclosed by the evidence, which is set out in the bill of exceptions. There was ample room for the plaintiff to have safely passed between the fence and the *wash-out*, and his very familiarity with the existence of the defect may have been an argument in his own mind inducing him to believe that he could pass it in safety. The possession of a walking-cane, with which he seems to have felt his way along when approaching the defective place, was a circumstance, also, favorable to the prospect of his safety. The plaintiff could not, we repeat, have been guilty of a want of ordinary care, *prima*

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facie, in selecting a route which was ordinarily travelled with safety by all pedestrians going in the same direction. If he was guilty of contributory negligence at all, it was not in selecting the route, but in the want of care exercised in the act of walking, after he had made the selection.

It is true, as argued, that he may have gone by some other less frequented street, or have followed a pathway, not often travelled, on the opposite side of the same street, where the evidence shows, however, there was no regular side-walk. But this was only a *condition* of the casualty. It is not what is commonly called the "*proximate cause*" of the injury, or what is termed by Mr. Wharton the "*juridical cause*" of it. "The negligence," he says, "to make a *juridical cause*, must be such that, by the usual course of events, it would result, unless independent disturbing moral agencies intervene, in the particular injury. It may be negligence in me to cross a railroad," he adds, "on a level, when by going a mile around I could cross on a bridge. Yet this negligence, in case I am struck by a train, is not the juridical cause of the collision, *if I keep a good look-out when I reach the road.*"—Whart. on Neg. §§ 324, 303. The practical construction of a "*proximate cause*" has been said to be, one from which "a man of ordinary experience and sagacity could foresee that the result might probably ensue."—Shear. and Redf. on Neg. § 10; *McGrew v. Stone*, 53 Penn. St. 436; *Bennett v. Lockwood*, 20 Wend. 223. Or, as otherwise stated, in the case of *defendants* sought to be charged, the principle has been declared to be, "every defendant shall be held to be liable for all those consequences which might have been *foreseen and expected* as the result of his conduct, but not for those which he could not have foreseen, and was therefore under no moral obligation to take into consideration."—3 Parson Contr. (6th Ed.) § 179.

The court did not err, therefore, in charging, as matter of law, that the failure of the plaintiff to select another route, under the facts of this case, did not constitute contributory negligence *per se* on his part.—*Erie City v. Schwingle*, 10 Harris (Penn. St.) 344; *Smith v. City of St. Joseph*, 45 Mo. 449.

We discover no error in the rulings of the Circuit Court, and its judgment must be affirmed.

[Hatchett v. Blanton.]

Hatchett v. Blanton.*Bill in Equity by Secured Creditor, for Reformation and Enforcement of Assignment.*

1. *Election by creditor, to take under or against assignment.*—A creditor, secured by an assignment of property voluntarily executed by the debtor, may elect whether he will accept its provisions, or will assert his rights independent of it; but he must accept or reject it as an entirety, and can not accept it in part and repudiate it in part—he can not claim both under and against it.

2. *Same.*—A general recital in the assignment, that it is the purpose and intention of the grantor to appropriate the property assigned to the payment of partnership and individual debts as a court of equity would marshal the assets, does not authorize the court, at the instance of a secured creditor, to change or subvert the uses expressly declared, and to appropriate property to the payment of partnership debts, on the ground that it is in fact partnership property, when the deed treats it as individual property, and directs its appropriation first to the payment of individual debts.

3. *Real property belonging to partnership.*—Real estate, purchased with partnership funds, or on partnership credit, and for partnership purposes, is, in a court of equity, regarded as partnership property, and subject primarily to the payment of partnership debts, whether the legal title is in the name of the partnership, in the name of one partner only, or in the names of the several partners as tenants in common; but, to have this effect, the property must be purchased with partnership funds, or on partnership credit, and for partnership uses; and where these two facts do not concur, the title and ownership are unchanged.

4. *Change in partnership.*—The introduction of a new member into an existing partnership works its dissolution, and the creation of a new partnership; and the new partner, in the absence of an express agreement, is neither liable for the debts of the old partnership, nor does he acquire any interest in its property.

5. *Cross-bill.*—A cross-bill can not be maintained when it is inconsistent with the answer, nor can it be supported on facts not averred in the answer; and this principle applies where there is an agreement of record that the defendants shall each be entitled, under his answer, to the same relief as under a cross-bill regularly filed.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. H. AUSTILL.

The original bill in this case was filed, on the 13th December, 1875, by Mrs. Mary B. Blanton, as a creditor of the late partnership of Phillips & Fariss, and its successor in business, Phillips, Fariss & Co., each of which firms conducted a mercantile business in the city of Montgomery; against Cyrus Phillips and Robert C. Fariss, the surviving partners of the latter firm, said Phillips being also the sole surviving partner

72	423
96	408
72	423
99	124
72	423
102	438
72	423
103	556
104	531
72	423
118	183
72	423
121	270

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of the former; and against the children and heirs at law of William B. Fariss, deceased, who was a partner of each of said firms; and against George W. Stone and F. H. Warren, as trustees in an assignment, or deed of trust, executed by said Phillips and R. C. Fariss for the benefit of their creditors and the creditors of said partnerships; and against F. Bugbee, and others, creditors secured by said deed of assignment. A copy of the assignment was made an exhibit to the bill; and the prayer of the bill was, "that the said deed may be reformed, so that it may give effect to the intention of the parties thereto, according to equity and good conscience, and the recitals to that effect therein contained; that complainant shall be decreed on final hearing, to have a lien on the property of said Phillips and Fariss; that an account may be taken of the effects of the said partnership in the hands of said trustees, and for other and further relief," under the general prayer.

The deed of trust, or assignment, as shown by the copy made an exhibit to the bill, contained these recitals: "*Whereas*, the late firm of Phillips & Fariss, which was composed of Cyrus Phillips and W. B. Fariss, the latter now deceased, is indebted to F. Bugbee in the sum of \$6,000, by promissory note made by said Cyrus Phillips and W. B. Fariss on the 14th March, 1862, and payable on 1st April, 1862: *And whereas* the late firm of Phillips, Fariss & Co., which was composed of said C. Phillips, W. B. Fariss, and Robert C. Fariss, is indebted to the following persons, in the following sums respectively"—namely, to Mrs. Mary B. Craik (now Blanton, the complainant in the bill), in the sum of \$2,492, as evidenced by the promissory note of said firm, dated April 23d, 1862, and in two other notes dated in April and May, 1862, respectively, and together aggregating about \$1,500; and to Mrs. E. C. Clements, since deceased, by a promissory note for \$216, signed by said partnership, and dated September 15th, 1858: "*And whereas* the said Cyrus Phillips is indebted individually to the following persons"—namely, to F. Bugbee, in the sum of \$6,000, as shown by his promissory note dated April 1st, 1868; to Henry C. Talbird, in the sum of \$2,200, due by promissory note dated 31st October, 1861; and to Mary C. Talbird, by balance due on promissory note dated 1st January, 1864, being about \$2,000: "*And whereas* the said Cyrus Phillips and Robert C. Fariss are each indebted to John W. McQueen, for their respective proportion of the losses sustained by the late partnerships of Fariss & Phillips, and Fariss, Phillips & McQueen"—each of which was composed of said C. Phillips, R. C. Fariss, and Jno. W. McQueen, their respective interests being stated—"the amount of said losses being not yet ascertained, but it is agreed that, for the purposes of this instrument, the share of said

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Phillips in the losses of said two partnerships shall not exceed \$7,500: *And whereas* the said partnership of Phillips & Fariss owns certain real estate, hereinafter described, in which said Cyrus Phillips owns an undivided one-half interest; and the said Phillips, Fariss & Co. owns certain other real estate, hereinafter described, in which said C. Phillips owns an undivided interest equal to forty per cent. thereof, and said R. C. Fariss owns an undivided interest equal to twenty per cent. thereof; and the said C. Phillips owns in his individual right either the entire or an undivided interest in certain other real estate, as hereinafter described: *And whereas* the said Cyrus Phillips desires that his said interest in said real estate shall be applied and appropriated to the security and payment of the above stated indebtedness, in the manner, and upon the same principles, as a court of equity would marshal and appropriate the same; and so also does the said Robert C. Fariss."

The deed then proceeds: "Now be it known, that I, Cyrus Phillips, for and in consideration of the premises, and for the purpose of securing the aforesaid indebtedness, do hereby grant," &c., "to said George W. Stone and Fred. H. Warren, an undivided one-half interest in and to a certain tract of land in Bullock county," particularly described, called the "Baldwin place," and said to contain 458 acres, "which was conveyed by M. A. Baldwin to Cyrus Phillips and W. B. Fariss by deed dated May 13th, 1863, which said tract of land is the partnership property of said firm of Phillips & Fariss; also, an undivided two-fifths interest in and to a certain other tract of land in Bullock county," particularly described, and said to contain 495 acres, "which said tract of land is the partnership property of said firm of Phillips, Fariss & Co.; also, certain lots in the city of Montgomery," particularly described, and together constituting the residence of said Phillips; "also, an undivided half interest in and two the following parcels of land situated in the city of Montgomery," being lot No. 10 on the north side of Market street, on which were erected two brick stores known as No. 37 and No. 39, and the lots in the rear fronting on Monroe street, with right of way, &c.; "also, an undivided one-fourth interest in and to the lot of land in the city of Montgomery, with the store thereon situated, at the north-east intersection of Lawrence and Market streets, and owned by said C. Phillips, Lewis Owen, the estate of W. B. Fariss, and the estate of James Fountain; which said lots known as the residence of the said C. Phillips, and said undivided interest in said other real estate last mentioned, are owned by said C. Phillips in his individual right, being all the real estate hereinbefore described and not stated as belonging to either of said firms, Phillips & Fariss, and Phillips, Fariss & Co." R. C. Fariss then con-

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veyed to the trustees, for the purpose of securing his proportion of the indebtedness of Phillips, Fariss & Co., and his proportion of the losses of said two firms, Fariss & Phillips, and Fariss, Phillips & Co., "an undivided one-fifth interest in and to said tract of land" contained 495 acres, "as the property of said firm of Phillips, Fariss & Co."

The deed contained a provision, that it should be void as to each of the grantors, if he paid his proportion of the secured debts, as specified, on or before the 1st April, 1874; and on their failure to do so, the trustees were authorized to sell the property conveyed, and were directed to appropriate the proceeds of sales, after paying all the expenses of the trust, as follows: "The proceeds realized by the sale of the interest of the said Cyrus Phillips, in the said real estate described and stated as the property of the said firm of Phillips & Fariss, to be appropriated first to the payment of the said Cyrus Phillips' portion of the said indebtedness due by said Phillips & Fariss, with the interest thereon; the proceeds realized by the sale of the interest of the said Phillips in the said real estate described and stated as the property of the said firm of Phillips, Fariss & Co., to be appropriated first to the payment of the said Phillips' portion of the said indebtedness due by said Phillips, Fariss & Co., with the interest thereon; and the proceeds realized by the sale of the said real estate described and stated as owned by the said Cyrus Phillips in his individual right, whether the same be an entire or an undivided interest, to be appropriated first to the payment, *pro rata*, of the said indebtedness due by said Cyrus Phillips individually, with the interest thereon, including his share and proportion of the said losses of Fariss & Phillips, and Fariss, Phillips & Co., but not to exceed \$7,500 as of this date; and should any surplus remain, after paying the indebtedness of either of said classes to which said proceeds are herein required to be first appropriated, then such surplus to be appropriated, *pro rata*, to the payment of the said indebtedness of both or either of said other two classes which may be unpaid, so that all the unpaid indebtedness of the said Cyrus Phillips shall share *pro rata* in said surplus." A provision was then inserted directing the trustees, on making a sale, to appropriate his one-fifth interest in said real estate, first, to the payment of his portion of the indebtedness of Phillips, Fariss & Co., and the surplus, if any, to the payment of his portion of the losses incurred by Fariss & Phillips, and by Fariss, Phillips & McQueen; and this provision was then added: "It is understood and admitted, that the said Cyrus Phillips' portion of the indebtedness of Phillips & Fariss is one-half, and of said Phillips, Fariss & Co. is two-fifths; and that said R. C. Fariss' por-

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tion of the indebtedness of said Phillips, Fariss & Co. is one-fifth."

The complainant claimed and alleged, that all the said real estate in the city of Montgomery, except the lots which constituted the residence of said Phillips, "was held, owned and possessed by said Phillips & Fariss as partnership property;" that the partnership of Phillips, Fariss & Co., "which was formed by the addition of Robert C. Fariss to the firm of Phillips & Fariss, became the successors of said Phillips & Fariss, and held, owned and possessed said real estate as their partnership property," and also acquired the said tract of land in Bullock county containing 495 acres, which they "held, owned and possessed as partnership property;" that the complainant and Mrs. E. C. Clements are creditors of the said firm of Phillips, Fariss & Co., as shown by the several notes held by them, "which are due and unpaid, and are subsisting liabilities and valid charges against the said partnership property of said firms, Phillips & Fariss, and Phillips, Fariss & Co.;" that F. Bugbee is also a creditor of said two firms, to the extent of \$6,000, with interest from April 1st, 1862; that the said city lots on which brick stores were erected, described in the deed as the individual property of Phillips, "in truth and in fact belonged to the partnership of Phillips & Fariss, and in equity and good conscience ought to be applied in the first instance to the payment of the liabilities of said firm, and the equities arising therefrom;" that all the debts of Phillips & Fariss have been paid, except the debt due to Bugbee, and the assets of that firm, including the real estate, are largely more than sufficient to pay his debts, leaving a balance which ought to be appropriated to the payment of complainant and Mrs. Clements, as creditors of Phillips, Fariss & Co.; "that the formation of the partnership of Phillips, Fariss & Co. was a partnership enterprise of said Phillips & Fariss, and it took possession of and held the said property above described [the city lots and stores], not as the property of the individuals composing the firm of Phillips & Fariss, but in truth and in fact as the property of said firm of Phillips & Fariss; that by reason of said possession so taken by said Phillips, Fariss & Co., said Phillips & Fariss (?) acquired a lien on the property of said Phillips & Fariss above described; and complainant is advised, and so charges, that said lien subsists, and remains a valid charge against said real estate, in favor of the creditors of said Phillips, Fariss & Co.—namely, your oratrix and Mrs. E. C. Clements." On these allegations, the bill prayed the relief above stated.

W. B. Fariss died in 1867, and R. C. Fariss and F. Bugbee were duly appointed and qualified as the executors of his last will and testament; but they were not made defendants as ex-

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ecutors, though each of them was made a defendant individually. R. C. Fariss made no defense, and a decree *pro confesso* was regularly entered against him. An answer was filed by F. Bugbee, as follows: "Respondent admits all the allegations of said bill, except only so much thereof as asserts the right of complainant and E. C. Clements, as creditors of Phillips, Fariss & Co., to share in the assets of the firm of Phillips & Fariss, or that the assets of said firm of Phillips & Fariss are of value more than sufficient to pay the partnership debts: these allegations are denied. Respondent admits, also, and avers that he is a creditor of Phillips & Fariss, and also of Cyrus Phillips, as alleged in the bill; and that the debts due him by said firm, and by said Phillips, are wholly unpaid."

An answer was filed by Cyrus Phillips, denying that there was any mistake in the deed of trust, and asserting that the property was intended to be appropriated as particularly stipulated in the deed. He alleged that the several conveyances for the city property, which the bill sought to subject to the debts of Phillips, Fariss & Co., were taken in the names of himself and said W. B. Fariss individually, and the property was held by them as tenants in common; that after the dissolution of their partnership, and the death of said W. B. Fariss, he and the heirs of said Fariss held said lands as tenants in common, subject only to the debt of said F. Bugbee, the only creditor of said partnership; and that he had, by the deed, devoted his undivided half interest to the payment of Bugbee's said debt, in recognition of his right. He denied that Phillips, Fariss & Co. "ever had any interest in any of said property, or ever held possession of the same, except it may be that they were tenants or agents of Phillips & Fariss; and respondent denies that any lien exists on any of said property, which can be made available to the creditors of Phillips, Fariss & Co." He asked that his answer might be taken as a cross-bill, and prayed "that an account be taken to ascertain the debts outstanding against the respective firms of Phillips & Fariss, and of Phillips, Fariss & Co., and against said Phillips individually; and of the property respectively belonging to and chargeable with the debts of said firms, and that belonging to and chargeable with the debts of said Phillips individually; that said property be sold, and the proceeds of sale appropriated in accordance with the principles of equity; or for such other and further relief as may seem meet."

An answer was filed by Stone and Warren, the trustees, alleging the facts, on information and belief, as stated in the deed of assignment, and denying the allegations of the bill so far as inconsistent with the statements of the deed; alleging that, in consequence of the conflicting claims which had arisen, they

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were unable to administer the trust without the aid and instructions of the court; and praying that their answer might be taken as a cross-bill—that the court would take jurisdiction of the trust, adjudicate and settle the respective claims and rights of the parties, order a sale of the property conveyed by the deed, and direct the appropriation of the proceeds of sale. A guardian *ad litem* was appointed for the infant heirs of W. B. Fariss, and he filed a formal answer for them. An answer was filed by McQueen's administrator, denying the allegations of the bill so far as they were inconsistent with the recitals of the deed, and stating the facts as they were recited in the deed; and he filed an answer to the cross-bill of Phillips, admitting its allegations. He admitted, also, that Bugbee was a creditor of Phillips & Fariss, but denied that he was a creditor of Phillips, Fariss & Co.

The cross-bills were not brought to issue; but an agreement of record was entered into, signed by the solicitors of all the adult parties, as follows: “*Whereas* Cyrus Phillips has filed an answer and cross-bill in this cause, and F. H. Warren and Geo. W. Stone, trustees, have also filed an answer and cross-bill; and *whereas* the original cause is now at issue as to all the defendants, but neither of the cross-causes is now at issue: Now, therefore, to expedite the hearing, and save further costs, it is agreed that the defendants, Cyrus Phillips, F. H. Warren and George W. Stone, trustees, F. Bugbee, M. C. Talbird, and H. C. Talbird, and George W. Nixon as administrator of John W. McQueen, shall each and severally have and be entitled to the same relief, upon their several and respective answers, as upon cross-bills filed by them severally, setting up their respective interests as shown by the original bill and their respective answers thereto; and that the answer of each of said defendants shall be regarded and held, as against the complainant, and as against each of the above named defendants, as a cross-bill, upon which the defendant making such answer shall be entitled to the same measure of relief as upon a cross-bill regularly filed and at issue by a general denial of all matters not admitted in the pleadings.”

The cause was submitted for decree, “upon the pleadings and testimony, and decree *pro confesso* against R. C. Fariss.” The defendants offered no testimony; and the only testimony offered by the complainant was the deed of assignment, the deposition of Cyrus Phillips, and an affidavit thereto appended, by consent, as a part of his deposition. In his said deposition, Phillips thus stated the facts connected with the several partnerships, the several parcels of land, and the claims of the several parties: “The partnership of Phillips & Fariss was formed in 1847, or about that time, and continued until the death of said

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Fariss in 1867. At his death, said firm owned stores on Market street in Montgomery, Nos. 37 and 39, one-half of store on corner of Market and Lawrence streets, a small brick house in rear of said Nos. 37 and 39, fronting on Monroe street, and a tract of land in Bullock county known as the *Baldwin* place, containing 458 acres. F. Bugbee was the only creditor, his debt being \$6,000, evidenced by note dated April 1st, 1862. We were equal partners throughout from the commencement of the partnership, and each owned a half interest in the property. The partnership of Phillips, Fariss & Co. was formed in 1856; composed of C. Phillips, W. B. Fariss, and R. C. Fariss. All the capital belonged to the two first, in equal portions, and each of them was entitled to forty per cent. of the profits; while R. C. Fariss had no interest in the capital, and received twenty per cent. of the profits. There was no partnership property, beyond the stock in trade. The real estate belonged to the old firm, Phillips & Fariss, who rented the stores to the new firm. W. B. Fariss controlled the real estate, above mentioned as belonging to Phillips & Fariss, during his life-time, and I did after his death. When the business of Phillips, Fariss & Co. was wound up, they owned a plantation in Bullock county known as the *German place*, containing 495 acres. The creditors of the firm were Mary Craik [now Blanton, the complainant], and another person who held two notes, afterwards transferred to complainant. The partnership of Fariss & Phillips, as the witness then stated, was formed in 1856, and continued until the early part of the year 1869; it had no creditors, and owned no real estate, but held a mortgage on a small lot at Fort Deposit in Lowndes county. It was succeeded by the firm of Fariss, Phillips & McQueen, which continued until the latter part of the year 1869; and on the settlement of its business, its debts all having been paid, Phillips and Fariss were found indebted to McQueen, as recited in the deed of trust. The witness then testified: "My individual creditors were, F. Bugbee, to the amount of \$6,000, with interest from April 1st, 1863; John W. McQueen, to the extent of \$7,000; Mary C. Talbird and H. C. Talbird," whose debts were described. "I intended by the deed to devote my half interest in the property of Phillips & Fariss, my forty per cent. interest in the property of Phillips, Fariss & Co., after paying the debts of the respective partnerships, and my individual property therein described, to the payment of these debts; but nothing was said in the deed about the prior payment of the partnership debts. Fariss & Phillips owned no real estate, and Fariss, Phillips & McQueen owned none but the lot at Fort Deposit, which I, as surviving partner, have since sold and conveyed in the firm name, and have the money now in my possession, being \$110. Fariss & Phillips

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and Fariss, Phillips & McQueen had nothing to do with the real estate of Phillips & Fariss, or Phillips, Fariss & Co.” (The witness then described the debt which Mrs. E. C. Clements held against the firm of Phillips, Fariss & Co.) “The real estate on Market street in Montgomery, and the half of the store on corner of Market and Lawrence streets, and the lots fronting on Monroe street, were bought and paid for by the firm of Phillips & Fariss, with money belonging to said firm. W. B. Fariss and C. Phillips collected the rents of said property as assets of said firm, in which said Phillips and W. B. Fariss were equally interested. This continued until the death of said W. B. Fariss. The deeds to all of said property were made to C. Phillips and W. B. Fariss by their individual names, but the deeds themselves will show more accurately.” [The deeds were not produced or proved.] “The note to F. Bugbee for \$6,000, dated March 14th, 1862, and payable 1st April, 1862, signed by C. Phillips and W. B. Fariss, was given for money borrowed, years before, by the firm of Phillips & Fariss; and this note was given in renewal of the debt, to keep it from running out of date. The money borrowed was used by the firm of Phillips & Fariss, and for the said firm. The real estate was entered on the books of Phillips & Fariss, each piece being debited in a separate account, with its costs, and all expenses incident to it, and credited with all income from it.”

On this submission of the cause, the chancellor decreed, “that this court will take jurisdiction of the trusts created by the deed of assignment to Geo. W. Stone and F. H. Warren, as trustees, a copy of which is attached to the original bill;” and ordered a reference to the register, to “state an account—1st, of the amount due to F. Bugbee by the partnership of Phillips & Fariss; 2d, of the amount due to the complainant and Mrs. E. C. Clements, as creditors of the firm of Phillips, Fariss & Co.; and, 3d, of the amounts due respectively to Bugbee, Mary C. Talbird, H. C. Talbird, and McQueen’s administrator, as creditors of Cyrus Phillips; also, to ascertain and report what part of the real estate described in the bill is, in law or equity, assets of the partnership of Phillips & Fariss, what part is assets of the partnership of Phillips, Fariss & Co., and what part is the individual property of said Cyrus Phillips, and whether there are any other assets of either of said partnerships.” Under this reference, the register reported the amounts due to the several creditors, being the debts described in the deed of trust, with interest thereon; and reported that the several city lots and stores, with the *Baldwin place*, were assets of the firm of Phillips & Fariss, and that the tract called the *German place* was assets of the firm of Phillips, Fariss & Co.; his conclusions as to these matters being based, as he stated, on the deed of as-

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sigument and the testimony of Phillips. Exceptions to the report were filed by McQueen's administrator, but were overruled by the chancellor, and the report was confirmed; and a final decree was then rendered, declaring that "the complainant in the original bill, and F. Bugbee as a creditor of Phillips & Fariss, complainant in cross-bill, are entitled to relief;" and ordering the register to sell the city lots and the *German place* (the *Baldwin place* having been already sold by the trustees), and appropriate the proceeds to the payment of the creditors of the two firms according to the priorities declared above.

The appeal is sued out by McQueen's administrator, who assigns as error the overruling of his exceptions to the register's report, the decree of the chancellor taking jurisdiction of the trust, and declaring the equities of the parties, and the final decree. Errors are also assigned by the infant heirs of W. B. Fariss, founded on various alleged irregularities in the proceedings, and each of the chancellor's decrees.

GUNTER & BLAKEY, for appellants.

D. S. TROY, *contra*.

BRICKELL, C. J.—By the assignment to Stone and Warren, the debts secured are divided into three classes. The first enumerated are the debts of the partnership of Phillips & Fariss, of which firm the assignor, Cyrus Phillips, is the survivor. The second are the debts of the partnership of Phillips, Fariss & Co., of which firm, Phillips, and the assignor, Robert C. Fariss, are the survivors. The third are Phillips' separate debts. Reciting that the assignors intend the property assigned and granted shall be appropriated to the payment of the secured debts as a court of equity would marshal and appropriate it, the assignment distinguishes and denominates the property as of three kinds, referring to its ownership. The first is the property of the partnership of Phillips & Fariss, consisting of real estate which is particularly described; and thereof and therein Phillips grants and assigns an undivided one-half, to be sold, and the proceeds of the sale applied to pay one-half, or his proportion, of the debts of that partnership. The second is the property of the partnership of Phillips, Fariss & Co., consisting of real estate particularly described; and thereof and therein Phillips grants and assigns an undivided two-fifths, to be sold, and the proceeds of sale applied, in like proportion, to pay the debts of that partnership; and the assignor, Fariss, grants and assigns one undivided one-fifth to be sold, and of the proceeds of sale like application must be made. The third is the separate property of Phillips, consisting of real estate, in parts of which it is

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recited that he has the entire estate, and in parts it is recited that he has an undivided interest, the quantity of which is specified; and the whole is granted and assigned, to be sold, and the proceeds of sale applied to pay Phillips' separate debts.

The appellee, a creditor of the firm of Phillips, Fariss & Co., and not otherwise having any rights under the assignment, or in its subject-matter, filed this bill for a two-fold purpose; the first of which is, the enforcement of the trusts of the assignment for the benefit of the creditors of Phillips, Fariss & Co., and, as auxiliary thereto, the subjection of the undivided two-fifths of the real estate, the legal title to which had descended to the heirs of the deceased partner, William B. Fariss. The second purpose is the subjection of the real estate in which Phillips assigned, for the security of his separate debts, an undivided share or interest, to the payment of the partnership debts of Phillips, Fariss & Co., upon the ground that it was the property of that partnership, and primarily liable for the payment of its debts.

In its first aspect, to enforce the trusts of the assignment as to the real estate of the partnership of Phillips, Fariss & Co., and, as auxiliary and incidental, the subjection to the payment of partnership debts of the undivided two-fifths, the legal title to which had descended to the heirs of the deceased partner, William B. Fariss, it is not necessary to consider the equity of the bill, as it has not been questioned. The controversy is directed specially to the second aspect of the bill; and in this aspect we are of opinion the bill is not maintainable.

It can not be doubted, that when a debtor voluntarily assigns property for the security and benefit of creditors, if the creditors choose to accept the assignment, they must abide by its terms and provisions; they must take it as an entirety; they can not accept in part, and repudiate in part.—Perry on Trusts, § 596; Burrill on Assignments (3d ed.), § 479. The creditor may have rights with which the assignment, so far it confers rights upon others, is inconsistent. The assignment may derogate from, instead of extending to him the measure of right to which he is entitled. If that be true, he must elect, whether he will accept the assignment, or whether he will reject it, and stand upon the right he may have independent of it. He can not elect to claim under the assignment the rights given by it, and repudiate it so far as it passes rights to others which are inconsistent with independent, distinct rights to which he may be entitled. If it were true that the real estate in controversy is the property of the partnership of Phillips, Fariss & Co., primarily liable for the payment of partnership debts, the fact remains, that in it Phillips assigns and grants a specific interest for the security and payment of his separate creditors; in effect

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declaring, that it is separate, not partnership property. The transfer and grant is as explicit, the use is as distinctly declared, as are the transfer and grant, and the use, under which the appellee deduces her right and claim. The assignor could create his own trustee, declare the quantity of estate or interest he would grant and assign, and the uses to which it should be appropriated. The creditors were as free to accept or reject the assignment. An accepting creditor must be content to abide by the uses declared for his benefit—he can not take them, and at the same time claim, in opposition to the assignment, property devoted to the use and benefit of other creditors. In *Pratt v. Adams* (7 Paige, 615), said Chancellor Walworth: “In the case of a voluntary assignment, where the assignor creates his own trustee, a creditor who comes in to claim a share of the fund under it, must take such share of it as the assignor intended to give him, and can not claim that which was intended to be given to the assignee in trust for others. A creditor of the assignor, whether provided for by the assignment or not, who wishes to repudiate the trusts of the assignment, on the ground that they are illegal, and a fraud upon the honest creditors of the assignor, must apply to set aside the assignment as fraudulent and void against him as a creditor, instead of coming in under the assignment as a preferred creditor or otherwise.”

Nor can the general recital, that it is the purpose of the assignor to appropriate the property assigned as a court of equity would marshal assets, authorize the change or subversion of any use expressly declared by the assignment. The recital indicates, that it was the intention of the assignors to apply partnership property first to pay partnership debts, and separate property to pay separate debts. The significance and comprehensiveness of the recital is limited and qualified—a definite application is given to it, by the particular and express grants of the assignment. These indicate and declare the property which was deemed partnership, and that which was deemed separate property; the uses are all expressed in reference to the declaration; and the property is devoted to the payment of debts in the order a court of equity would apply it, if, in case of insolvency, the court was marshalling separate and partnership assets. If, upon the theory that the assignors were mistaken in point of fact, or of law, in deeming property which is expressly granted and declared as of one class, the court should intervene, pronounce it of another class, nullify the uses declared, and appropriate the property to other uses, the assignment would not be carried into effect, but would, *pro tanto*, be set aside. There may be cases in which creditors have an equity to vacate the uses of an assignment, and to obtain a decree appropriating the property assigned to other and different uses. In all these

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cases, the equity is independent of the assignment, and can not be claimed by a creditor who has accepted the rights and benefits the assignment confers.

Real estate, acquired with partnership funds, or on partnership credit, and for partnership purposes, in a court of equity is esteemed partnership property, subject to the payment of partnership debts, in priority of the separate debts of the several partners; and it is not material whether the legal title resides in the partnership, or in the several partners as tenants in common, or in the name of one partner only.—*Pugh v. Currie*, 5 Ala. 446; *Lang v. Waring*, 17 Ala. 145; *Andrews v. Brown*, 21 Ala. 437; *Little v. Snedcor*, 52 Ala. 167. Steering clear of all cases of fraud, or of the use by one partner, without the approbation of his associates, of partnership funds in the acquisition of real estate, the two facts must concur to constitute real estate partnership property—acquisition with partnership funds, or on partnership credit, and for the uses of the partnership. *Ware v. Owens*, 42 Ala. 212; *Owens v. Collins*, 23 Ala. 837; *Hoxie v. Carr*, 1 Sumner, 198; *Parsons on Partnership*, 365. The real estate now in controversy was purchased before the formation of the partnership of Phillips, Fariss & Co., and was not paid for with the funds of that partnership, but was paid for with the funds of the preceding partnership of Phillips & Fariss. It is possibly inferrible from the averments of the bill, and from the evidence, that upon a part of the real estate, the business of the partnership of Phillips, Fariss & Co. was carried on, as had been the business of the preceding partnership of Phillips & Fariss. The mere use of the property by the partnership, did not impress upon it the character of partnership property. It is not of uncommon occurrence, that a partnership uses the property of its several members, or of a preceding partnership. In the absence of an agreement that the property shall become joint property, its title and character is unchanged.—*Ware v. Owens*, *supra*; *McCrary v. Slaughter*, 58 Ala. 230. The existence of such an agreement, in this case, is not alleged or proved.

The identity of the partnership of Phillips & Fariss, with that of Phillips, Fariss & Co., a proposition the bill seems to assert, is not true, either as matter of law, or as matter of fact. The introduction or incoming of a new member into an existing partnership, in contemplation of law, works its dissolution, and the creation of a new partnership.—*Parsons on Partnership*, 34. The incoming partner is not liable for the debts or engagements of the former partnership, save so far as by express agreement he may assume liability; and in the property of the former partnership he acquires no other or greater interest than such as is by express agreement conferred.—*Parsons on Partnership*,

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434. If the property is carried into the new partnership, it becomes the property of that partnership—ceases to be, and is freed from all the liabilities to which it might have been subjected, as the property of the preceding partnership. The termination of the partnership of Phillips & Fariss, and the creation of a new partnership, having a new style or firm name, with an additional member, the partners sharing in the profits and losses in differing proportions, was the intention of the parties by the introduction of Robert C. Fariss as a member. Into the new partnership, as a part of its property, the real estate in contention was not carried; and of it the partnership had no ownership, nor in it any interest, legal or equitable.

The chancellor decreed the real estate in controversy was the property of the partnership of Phillips & Fariss, and not the property of the several partners as tenants in common; ordered its sale, and appropriated the proceeds of sale to the payment of partnership debts, in exclusion of the separate debts of the assignor, Phillips, for the security and payment of which, by the assignment, he had appropriated his undivided interest, the quantity of which is specified particularly. A decree of a court of equity can not be supported, when assailed on error, unless it is founded upon, and conforms to the pleadings and proof in the cause.—*Maurry v. Mason*, 8 Porter, 211; *Langdon v. Roane*, 6 Ala. 518. If it were conceded, that it is shown by the evidence the real estate is the property of the partnership of Phillips & Fariss, and not of the partners as tenants in common, it is obvious, without vacating the uses declared by the assignment, it could not be appropriated to the payment of the partnership debts, in exclusion of the separate debts to which Phillips had appropriated his undivided share or interest. There was no party before the court claiming in opposition to the assignment, or the vacation of any use declared by it. There was no pleading assailing it, except so far as it may be regarded as assailed by the original bill; and in that respect, as we have said, the original bill is not maintainable. The hearing, it is true, was had upon an agreement that the answers of several of the defendants should be taken as cross-bills, and that severally they should be entitled to the relief which they could have obtained upon a cross-bill disclosing their respective interests. If a cross-bill, seeking the vacation of the assignment in respect to this property only, could be entertained in the present suit,—a question we do not consider,—Bugbee, the sole creditor of the partnership of Phillips & Fariss, is the only party who could have maintained the cross-bill, if it would have been germane and appropriate to the subject-matter of the original bill. The assignment confers upon him the primary security from the proceeds of the sale of a part of the property which is assigned

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only by Phillips, and assigned as the property of the partnership of Phillips & Fariss. The answer found in the record does not repudiate, while it does not expressly accept the assignment, so far as it confers upon him this peculiar, exclusive right. If he intends the acceptance of this particular right, shutting out all inquiry by the other creditors secured by the assignment, whether he is entitled to it, there ought to have been in the answer a direct, open disclaimer of all rights under the assignment, and an assertion of the superior equity upon which he relies. There is not, in his answer, any such disclaimer, nor any indication of a purpose to claim in opposition to the assignment. There is no repudiation of the security proffered by the assignment, accompanied by the assertion of a superior and independent equity. If he had filed a cross-bill (and we are, in respect to the agreement found in the record, considering the case as if it had been filed), the facts upon which it was founded must have been averred in the answer. The answer is general, brief, and in it there is introduced no averment assailing the assignment, negating its validity and operation as it is expressed, repudiating it, or asserting that it ought to be vacated. A cross-bill, departing from, and inconsistent with the answer, could not have been well entertained.—*Dill v. Shahan*, 25 Ala. 694; *Graham v. Tankersly*, 15 Ala. 634.

In any aspect of the case, the decree in this respect is not founded upon, or in conformity to appropriate pleading, and can not be sustained.

Whether this specific property is partnership property, or the property of the several partners as tenants in common, is not a question now presented for decision; and if it were, there would be much of difficulty in reaching a satisfactory conclusion. Real estate may be acquired with partnership funds, and employed for the use or convenience of the partnership, without becoming necessarily partnership property. The partners may intend to hold it separately as tenants in common, and not jointly, as partners. They may intend to withdraw from the joint stock the funds invested in its acquisition, and a new investment, in which each partner will hold in severalty his share or interest. *Prima facie*, the condition of land is precisely that which is indicated by the muniment of title. The mere use of partnership funds, with the knowledge and approbation of the partners, in its acquisition, will not, of itself, repel the presumption arising from the muniment of title, or impress upon the land the character of partnership property. The inquiry is, what was the intention of the partners; and it must be solved from a consideration of all the circumstances attending the transaction.—1 Am. Lead. Cases (5th ed.), 602; Parsons on Partnership, 363; *Fall River v. Borden*, 10 Cushing,

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458; *Tillinghast v. Champlin*, 4 R. I. 205; *Coder v. Huling*, 27 Penn. St. 84; *Hoxie v. Carr*, 1 Sumner, 174.

It is not necessary to pass upon other questions raised by the assignment of errors, which may not be presented in the further progress of the cause.

The decree of the chancellor must be reversed, and the cause remanded.

STONE, J., not sitting.

Ward v. Corbett.

Statutory Proceeding for Partition of Lands.

1. *Partition by Probate Court; where parties own unequal interests.* Under its statutory power to make partition of lands among several joint owners or tenants in common (Code, §§ 3497-3507), the Probate Court has no jurisdiction to decree partition where the lands are not susceptible of division into equal parts, or parts of equal value; and this can not be done, where the parties own unequal interests—as, where one of four joint owners, or tenants in common, has conveyed a part of his undivided interest to another. (*Overruling Stimpson v. Malone & Foote*, 60 Ala. 338.)

APPEAL from the Probate Court of Montgomery.
Tried before the Hon. F. C. RANDOLPH.

R. M. WILLIAMSON, for appellant.

SAYRE & GRAVES, *contra*.

STONE, J.—This was a proceeding instituted in the Probate Court, for the partition of a small lot of land, under Article 1, Chapter 14, Title 2, Part 3 of the Code of 1876, commencing with section 3497. The petition sets forth that the land is held and owned by four equal tenants in common, of whom the petitioner, Mary Corbett, and Peter Ward, the appellant, are two. In proceedings such as this, in the Probate Court, the partition can only be made by lot; and hence, if the land be not susceptible of division into equal parts, or parts of equal value, partition can not be made by metes and bounds; and if the tenants own in unequal interest, the Probate Court has no jurisdiction to effect partition.—*Whitman v. Reese*, 59 Ala. 532; *Newbold v. Smart*, 67 Ala. 326; *Terrell v. Cunningham*, 70 Ala. 100.

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The answer to the partition is not very fully expressed; but great technicality in pleading is not required, in cases like this. One ground of defense relied on is, that Mary Corbett, the petitioner, had previously conveyed to Peter Ward a certain described part of the land she seeks to have partitioned; and that he, Ward, had sold back the lot to her, but she had not paid the purchase-money. Now, if we admit that Mary Corbett's conveyance to Peter Ward did not transfer the absolute ownership to that part of the land, because she herself owned but an undivided interest, it was good to convey her undivided fourth interest in that part of the lot, and this destroyed the equality of ownership. If true, this ousted the Probate Court of jurisdiction. The court erred in sustaining the petitioner's demurrer to the answer.

The claim for improvements alleged to have been made by Ward, is scarcely full enough to raise the question.—Freeman on Co-Tenancy, §§ 261, 510; *Drennen v. Walker*, 21 Ark. 539; *Seale v. Soto*, 35 Cal. 102; *Brookfield v. Williams*, 1 Green, C. C. 341; *Crafts v. Crafts*, 13 Gray, 360; *Hart v. Hawkins*, 3 Bibb, 502; *Pope v. Whitehead*, 78 N. C. 191.

The case of *Stimpson v. Malone & Foote*, 60 Ala. 338, so far as in conflict with this opinion, is overruled.

Reversed and remanded.

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Bill in Equity by Judgment Creditor, to subject Equitable Assets, under charge of Fraud.

1. *Receiver; appointment before answer.*—The practice is settled with us, in accordance with the modern English practice, that a receiver may be appointed before answer filed, when the exigency of the particular case is clearly shown by affidavits.

2. *Same; affidavits, and how rebutted.*—The practice is well established, that *ex-parte* affidavits may be received in support of an application for the appointment of a receiver, and counter affidavits in opposition to it; but the court "is unwilling to sanction the practice, which seems to have been followed in this case, of permitting a voluminous deposition, containing irrelevant matter, to be introduced for the purpose of contradicting the affidavit of the deponent." If it was necessary to rebut or impeach the statements of the affidavit, it should have been done by an extract of the pertinent matter from the deposition, embodied in an explanatory affidavit, or attached thereto as an exhibit.

3. *Same; who may ask, and is entitled to.*—A judgment creditor of an insolvent debtor, having an execution returned "No property found," and seeking by his bill to reach and subject the debtor's alleged interest in certain crops raised on a plantation carried on in the name of another

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person, shows such a lien on or title to the crops as authorizes him to ask the appointment of a receiver; and the proof showing very clearly that the property is being rapidly disposed of by irresponsible parties, under the management of the debtor, so that its loss is imminent, and the charge of fraud being strongly supported by all the circumstances of the case, a *prima facie* case for the appointment of a receiver is made out.

4. *Same; want of parties, or of notice.*—That some of the parties in interest are not before the court, and that others have had no notice of the application, is no valid objection to the appointment of a receiver; since the receiver holds for the parties in interest, and his appointment does not affect any existing rights, nor prejudice the rights of persons before the court, who may at any time propound their interest.

APPEAL from the Chancery Court of Montgomery.
Heard before the Hon. JOHN A. FOSTER.

GUNTER & BLAKEY, for appellants.

TROY & TOMPKINS, *contra*.

SOMERVILLE, J.—The present appeal is from an interlocutory order of the chancellor appointing a receiver, and made at the instance of the complainants, who are judgment creditors of B. H. Micou. It fully appears that, upon this judgment, there had been issue of execution, with return of "No property found;" and the purpose of the bill is to reach an equitable interest of Micou, which he is alleged to own in certain crops raised in Montgomery county, in the year 1882, on a plantation carried on in the name of one G. R. Micou.

The practice is settled in this State, in accordance with the modern English practice, that a receiver may be appointed before answer filed, where there is clear proof of the exigency of the particular case, shown by affidavits. If any other rule were allowed to prevail, the purpose designed by the application might very often be defeated by delay.—*Weis v. Goetter, Weil & Co.*, at present term (*ante*, p. 259); *Kerr on Receivers*, 136, and *note*; *Williamson v. Wilson*, 1 Bland, 422; *Bloodgood v. Clark*, 4 Paige, 577.

The statute requires the application for such an appointment to be made in writing. It may be made to the chancellor, either in term time, or in vacation, but to the register only in vacation. When made in vacation, reasonable notice of the time of such application, and the person to whom it will be submitted, is required to be given, or else good reason must be shown for the failure to do so.—Code, 1876, §§ 3881, 639.

The practice is also firmly established, that *ex-parte* affidavits may be introduced in support of the application; and counter-affidavits may be received in opposition to, and rebuttal of the statements upon which the application is predicated.

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The proceedings in the present case seem to have in substantial accordance with these rules. We are not willing, however, to sanction the practice, which appears to have been followed in this case, of permitting a voluminous deposition of one of the affiants to be introduced, containing much irrelevant matter, for the purpose of contradicting his affidavit, on a single point, which was made in resistance of the application, when the same purpose could have been accomplished by an extract of the pertinent matter from such deposition, embodied in, or attached as an exhibit to an explanatory affidavit, thus fully and fairly presenting the matter of rebuttal desired to be introduced in evidence, by way of counter admission, or of impeachment. The record, however, discloses no objection to this on the part of the defendant in the court below.

If it be true that the defendant, Micou, owned an equitable interest in the crops, for the custody of which the present receivership is asked, the *lien or title* of the complainants is very clearly of such a character as to authorize the granting of their application, if there be no other objection which can be deemed fatal to it. They were judgment creditors, who had pursued their debtor to insolvency in a court of law, having an execution on their judgment returned unsatisfied; and the interest sought to be subjected was a mere equitable one, not liable to be sold under execution at law. In cases of this nature, the courts always lend a ready ear to applications for the appointment of a receiver.—*Weis v. Goetter, Weil & Co., supra; Osborn v. Heyer*, 2 Paige, 342; *Bloodgood v. Clark*, 4 Ib. 577; Kerr on Receivers, 58–59.

The whole object had in view, in the appointment of a receiver, is to provide for the safe custody of the property, pending the litigation which is to settle the conflicting claims of the parties litigant. The appointment can, of course, create no rights in the subject-matter of litigation, such a result being entirely foreign to its purpose. It can neither affect the question of title, nor involve any judicial determination of it. *Chase's case*, 1 Bland's Ch. 206; s. c., 17 Amer. Dec. 277; Mitford's Pl. 133. The exercise of the power must rest very largely within the sound legal discretion of the court, and should be brought into activity always with great caution and circumspection, especially when invoked against a party in possession under the legal title.—*Hughes v. Hatchett*, 55 Ala. 631; Kerr. on Receiv. 4, 115; *Briarfield Iron Works v. Foster*, 54 Ala. 622; *Ex parte Walker*, 25 Ala. 81.

No positive or unvarying rule can be laid down, to regulate such appointments in all cases. It has sometimes been said, that a receiver ought to be appointed only "to prevent fraud, save the subject of litigation from material injury, or rescue it

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from threatened destruction.”—*Baker v. Baokus*, 32 Ill. 79; *Briarfield Iron Works v. Foster*, 54 Ala. 634, *supra*. By other authorities, the rule is said to be, that “there must be a legal or equitable right, reasonably clear and free from doubt, attended with danger of loss.”—*Randle v. Carter*, 62 Ala. 95, 102; *High on Receivers*, §§ 55–59. In another leading case, often approved, it is asserted, that “fraud, or imminent danger, if the intermediate possession should not be taken by the court, must be clearly proved.”—*Blondheim v. Moore*, 11 Md. 364; *Mays v. Rose*, 1 Freeman’s Ch. (Miss.) 703.

The rule is stated by Mr. Kerr, in his work on Receivers, as follows: “If it appears to the court that the plaintiff has established a good *prima facie* equitable title, and that the property, the subject-matter of the suit, is in danger if left in the possession of the party against whom the receiver is prayed, until the hearing, or, at least, that there is reason to apprehend that the plaintiff will be in a worse situation if the appointment of a receiver be delayed, the appointment of a receiver is almost a matter of course.”—Kerr on Receivers, 7–8.

We are of opinion that the complainants have established a good *prima facie* case for such an appointment. The fact is not denied, that the defendant, B. H. Micou, is utterly insolvent, and that complainants hold against him an unsatisfied judgment for a large amount, the validity of which is not disputed, and upon which they have had execution with a return of no property found. It further appears, from very clear proof, that the property in dispute is being rapidly disposed of by irresponsible parties under the management of Micou, so that its loss is imminent. Fraud is also charged against the judgment debtor, and the entire circumstances of the whole case, including his own admissions and testimony outside of the case, strongly support the imputation. The statements made in some of the affidavits are conflicting, and we refrain from any detailed discussion of them, as it is not our purpose to give any opinion upon the merits of the issues to be tried by the chancellor. It is enough to say, that they make out a *prima facie* case in favor of the complainants, based upon the probability that B. H. Micou has an equity in the subject-matter of litigation, which is liable to the satisfaction of the judgment which is the foundation of this suit; that he is utterly insolvent, and without the appointment of a receiver there is imminent danger of the entire property being speedily wasted and lost, to the serious injury of the complainants, who make this application.

In view of this *status* of the case, it is no valid objection to the appointment of a receiver, that some parties in interest are not before the court, and others have had no notice of the application. A receiver is always understood to hold for the par-

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ties entitled. Persons holding paramount claims, who are not already before the court, are at liberty to come in at any time, and, on application, each will be examined *pro interesse suo*; and the receivership can be discharged, when the justice of the case shall authorize the making of such an order by the chancellor. If any other rule were allowed to prevail, parties holding mere legal titles, by absenting themselves from the jurisdiction of the court, could easily paralyze this right arm of its power, which is so often omnipotent in circumventing the artifices of fraud, and preventing irreparable damage.

The decree of the chancellor appointing a receiver, from which the present appeal was taken, must be affirmed.

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Statutory Proceedings for Condemnation of Right of Way.

1. *Taking private property for public uses; constitutional provisions as to pre-payment of compensation, right of appeal, and trial by jury.*—The several clauses in the present constitution relating to the taking of private property for public uses by corporations or individuals (Art. 1, § 24; Art. xiv, § 7), construed in connection with the pre-existing law and judicial decisions, were intended to secure just compensation to the owner of the property taken, and to compel its payment before the appropriation was complete; also, to secure the right of appeal from the preliminary assessment of damages, without regard to the character of the tribunal or body by which the assessment may be made; and the right to a trial by jury, on the demand of either party, when the error or matter complained of is the amount of damages assessed.

2. *Statutory proceedings for condemnation of right of way; appeal, and trial by jury.*—The statute regulating proceedings for the assessment of damages, when lands are taken by a railroad corporation for the right of way (Code, §§ 1833–40), was intended to carry into effect these constitutional provisions, and must be so construed, if possible, as to effectuate that intention, and to harmonize the statute with the constitution; and thus construing the section which gives an appeal to either party, and declares that “the same proceedings shall be had as in ordinary cases of appeal from the Probate [Court] to the higher courts of the State” (§ 1838), it must be held to give an appeal to the Circuit Court, of which a jury is a constituent, thereby securing the right to a trial by jury, if demanded.

3. *Same; right to open and conclude argument.*—In these proceedings, the railroad corporation is the actor, and on appeal, when an assessment of damages by a jury is demanded, is entitled to open and conclude the investigation and the argument.

APPEAL from the Circuit Court of Montgomery.
Tried before the Hon. JAS. E. COBB.

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These two cases, involving substantially the same questions, were argued and submitted together. Each was a statutory proceeding, instituted by the Montgomery Southern Railway Company, a domestic corporation organized under the general law (Code, §§ 1821-41), seeking to condemn lands for the right of way of its road; the lands in one case belonging to W. D. Sayre, and in the other to A. S. Sayre and M. H. Sayre. In each case, the proceeding was originated by a petition filed by the railroad company, addressed to the judge of probate; alleging that the petitioner desired to obtain the right of way through the defendant's lands, particularly described, and had made application to purchase the necessary strip of land, but had not been able to make any contract with the owner; and asking that commissioners be appointed to determine the compensation to be paid to the owners in each case. Commissioners were appointed, and notice was given to the owners in each case, as required by the order of the court and the statute; and the commissioners made their report under oath, awarding \$85 as compensation to A. S. and M. H. Sayre, and \$182 to W. D. Sayre. A. S. and M. H. Sayre then made a motion in the Probate Court, or before the judge of probate, to set aside and annul the report and award of the commissioners, and the order appointing them, on these grounds: "Because this court, or the judge thereof, had no jurisdiction, power or authority to make the order appointing said commissioners; because there is no law which authorized said court or judge to make such order or decree; and because the pretended law, under which said order was made and said proceedings had, is unconstitutional, null and void." The court overruled this motion, and the said A. S. and M. H. Sayre then took an appeal to the Circuit Court, not from the order overruling said motion, but "in the matter of the proceedings to assess their compensation for the right of way through their lands by said railroad company." In the Circuit Court, as the bill of exceptions recites, "the said A. S. and M. H. Sayre moved the court to quash said proceedings had in the Probate Court, and to dismiss said cause out of that court; which motion was granted by the court, and said railroad company excepted." The railroad company appeals from this ruling and judgment, and here assigns the same as error.

W. D. Sayre also moved to set aside the award and the order appointing the commissioners, on the same grounds as specified in the other case; and his motion being overruled, he took an appeal to the Circuit Court. In that court, as the bill of exceptions states, "both parties having announced themselves ready, said W. D. Sayre demanded a trial by jury; which was ordered by the court, and the cause was submitted to a jury. Thereupon, said

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railroad company claimed the right to open and conclude as plaintiff, and the court conceded the right; to which action and ruling of the court said Sayre duly excepted." The jury assessed the damages, or compensation to be paid, at \$365; and the court rendered judgment in Sayre's favor, against the railroad company, for this sum. Afterwards, as the judgment-entry and the bill of exceptions each shows, Sayre moved the court "to set aside the verdict, and vacate the judgment rendered in this cause, and to render judgment vacating the proceedings had in the Probate Court, on the ground that said proceedings were without authority of law, and that this court had no jurisdiction to submit this cause to a jury, nor to render judgment on the verdict of the jury." The court overruled this motion, and the Sayres duly excepted. The appeal is sued out by the Sayres, and they here assign as error the judgment of the Circuit Court, and the several rulings to which they reserved exceptions.

CLOPTON, HERBERT & CHAMBERS, and SAYRE & GRAVES, for Montgomery Southern Railway Company.—(1.) By constitutional provision, the right of eminent domain is reserved to the State unabridged, but just compensation is required to be made to the owner of the property taken; and when the right to take private property is conferred by law on corporations or individuals, it is provided that the right of appeal, and the right to a trial by jury, shall be secured to either party.—Art. xiv, § 7. Before the adoption of the present constitution, the right of appeal was only a legislative right, subject to the control of the General Assembly; and no appeal could be taken except in the cases authorized by law. This provision was intended to take the right of appeal in such cases as this, as it then existed, out of the pale of legislation. The intention was not to create a new right, but to prohibit the General Assembly from taking away from any person the right of appeal as it then existed. Under the laws then existing, an appeal might be taken from the Probate Court, either to the Circuit Court, or to the Supreme Court.—Code, §§ 3954, 3957. Coupled with this right of appeal, by the same constitutional provision, the right of a trial by jury was secured in all cases involving the amount of damages. In the Supreme Court, an appeal is necessarily to be decided from the record alone; but in the Circuit Court, of which a jury is a constituent part, a trial by jury may be claimed, and, when claimed, is matter of right. An appeal must be taken under the rules regulating appeals; and when taken, it is to be tried like other cases, upon the record or bill of exceptions, except that, on a question of damages, either party may demand a trial by jury. The constitutional provis-

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ion is self-executing (*Miller v. Marx*, 55 Ala. 322; Cooley's Const. Lim. 101), and comes to the aid of the statute, or, rather, the statute must be construed as if the constitutional provision were incorporated in it.—*United States v. Babbitt*, 1 Black, 58; *United States v. Coombs*, 12 Peters, 72. (2.) W. D. Sayre voluntarily submitted to the jurisdiction of the Circuit Court, and demanded a trial by jury; and he is now estopped from denying the validity of the law under which he claimed it.—*Powell v. Boone*, 43 Ala. 459; *McDonald v. Life Insurance Co.*, 65 Ala. 358. (3.) In such proceedings as this, the railroad company is necessarily the actor, or plaintiff, whether it occupies the position of appellant or appellee; and as plaintiff, is entitled to open and conclude the case.

TROY & TOMPKINS, for W. D. Sayre, A. S. Sayre, and M. H. Sayre.—(1.) No law providing for an assessment of damages, in such cases as these, can be sustained as valid, unless it provides (1st) for the payment of the compensation before the property is taken, (2d) for an appeal by either party, and (3d) for a trial by jury to determine the damages, on the demand of either party. This law does not provide for a trial by jury, and the right is in effect prohibited by the provision which declares that, on appeals, "the same proceedings shall be had as in ordinary cases of appeal from the Probate [Court] to the higher courts." The *proceedings on appeal* must mean the trial and its incidents, and not the preliminary steps to taking an appeal. There is no provision for a trial by jury, in ordinary cases of appeal from the Probate to the Circuit Court, but such cases are tried on the record, or on bill of exceptions.—Code, §§ 3954-58. If the provisions of the general law could be so modified as to give a trial by jury in such cases, when the appeal is taken to the Circuit Court, the right would be completely taken away whenever the appeal was taken, as it might be, to the Supreme Court. In failing, then, to secure the right to a trial by jury, the statute is unconstitutional and void.—*Tims v. The State*, 26 Ala. 165; *Ex parte Houghton*, 38 Ala. 570; *Thomas v. Bibb*, 44 Ala. 710; *Greene v. Bragg*, 1 Curt. C. C. 311. (2.) The statute being unconstitutional and void, the Probate Court had no jurisdiction of the proceedings, and the Circuit Court acquired no jurisdiction by the appeal.—Cooley's Const. Lim. § 188, note 2, and authorities cited. The proceeding being void for want of jurisdiction, appearance could not amount to a waiver of the defect; and the parties are not estopped from raising the objection after judgment.—Bigelow on Estoppel, 129, 508; 2 Brick. Dig. 157-8, §§ 12, 21; *Miller v. Miller*, 5 Heisk. Tenn. 723; *Mercier v. Chase*, 9 Allen, 242. (3.) It was necessarily incumbent on the party whose land was

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sought to be taken, to show the amount of damages he might sustain, or had sustained. The railroad company stands on the defensive, and is not required to adduce any evidence; and the laboring oar being on the owner, he is entitled to open and conclude the argument.—3 Bla. Com. § 366; 1 Greenl. Ev. § 74; 7 Eng. L. & Eq. 578.

BRICKELL, C. J.—The 7th section of the 14th article of the constitution provides, that “Municipal and other corporations and individuals, invested with the privilege of taking private property for public use, shall make just compensation for the property taken, injured or destroyed by the construction or enlargement of its works, highways, or improvements, which compensation shall be paid before such taking, injury or destruction. The General Assembly is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages, against any such corporations or individuals, made by viewers or otherwise; and the amount of such damages, in all cases of appeal, shall, on the demand of either party, be determined by a jury according to law.” The 24th section of the “Declaration of Rights,” among other things, provides, that “private property shall not be taken or applied for public use, unless just compensation be made therefor; nor shall private property be taken for private use, or for the use of corporations other than municipal, without the consent of the owner: *Provided, however,* That the General Assembly may, by law, secure to persons or corporations the right of way over the lands of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; but just compensation shall, in all cases, be first made to the owner.”

The principal question these cases involve is, whether the statute which authorizes corporations, organized under the general law, for the construction of railroads within the State, to condemn and take private property for the uses of the corporation, secures to the owner the right of appeal from the award of the commissioners appointed to assess the compensation to be paid him, and on such appeal a trial by jury, if such trial is claimed by either party, meets and satisfies the requirements of the constitution in this respect. The provision of the statute, upon the construction of which the question depends, reads: “An appeal may be taken by either party, and the same proceedings shall be had as in ordinary cases of appeal from the Probate to the higher courts of this State.”—Code of 1876, § 1838.

Before the adoption of the present constitution, not infrequently, the General Assembly, to serve and accomplish some

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public use, delegated not only to counties, political subdivisions of the State, but to municipal and private corporations, and to individuals, the power of eminent domain—the power of taking private property for public uses. The statutes delegating the power, to conform to the constitution, it was settled, must in themselves have provided adequate and appropriate remedies, by which the owner whose property was taken could obtain for it just compensation. Whether payment of the compensation should precede or attend the taking of the property, or whether the mandate of the constitution was satisfied, if an adequate remedy was provided by which it could be obtained, was, in this State, an unsettled question.—*Aldridge v. T., C. & D. R. R. Co.*, 2 Stew. & Port. 199; *Sadler v. Langham*, 34 Ala. 311. The remedy most usually provided for ascertaining the compensation, was the verdict or award of viewers, or commissioners, as they were indifferently termed. These generally derived their appointment from a court of record, to whom their report was returned. They were regarded as inferior, statutory tribunals, clothed with a special jurisdiction; and unless the statute otherwise provided, their action was final and conclusive.—*Mills' Eminent Domain*, § 322. If errors of law, or irregularities, intervened, apparent on the face of the proceedings, a writ of error, or an appeal, the substitute for a writ of error in our system, would not lie for their revision and correction; a writ of *certiorari* was the only appropriate remedy which could be employed for that purpose.—*Ex parte Tarleton*, 2 Ala. 35; 1st Brick. Dig. 533, §§ 2, 4.

Reading the clause of the constitution to which we have referred in connection with the pre-existing law, it seems manifest, a distinct purpose it was intended to accomplish was the guaranty and security to the owner of just compensation for his property, taken for public uses, and to compel its payment before the taking and appropriation was complete. And such payment, it must be observed, is guarantied and secured, without regard to the agency employed in the taking—whether it is the State, in its sovereign capacity, or a county, one of its political subdivisions, or a municipal or other corporation, or an individual. A provision by which compensation could be obtained was, prior to the introduction of this clause, esteemed an indispensable element to the validity of any statutory enactment, authorizing the taking of private property for public uses. The payment of the compensation before the taking and appropriation is complete, is the plain language, more than once repeated, and the manifest intent of the constitution. Another purpose, equally manifest, confined to a taking by municipal or other corporations, or by individuals invested with the privilege of taking private property for public uses, is, that the parties

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shall not be deprived of—in other words, must have—the right of appeal from the preliminary assessment of damages, without regard to the character of the body or tribunal to which the making of such assessment may be committed. Such body or tribunal remains, as it was known and defined at common law, an inferior, statutory jurisdiction, proceeding by summary methods, and in a course different from that observed and pursued in the courts of common law. But the General Assembly is now prohibited from rendering its action final and conclusive, or from limiting the parties to a mere revision by writ of *certiorari* of errors or irregularities apparent on the face of the proceedings. A remedy by appeal must be afforded, and the revision must be co-extensive with the injury which may be suffered in the course of the proceedings. If the error complained of is the amount of damages assessed, on the demand of either party, on appeal, the damages must be assessed by a jury.

It is contended, that the statute referred to is offensive to the constitution, because, while it authorizes an appeal, the requirement is, that the proceedings on the appeal shall be as in ordinary cases of appeal from the Probate Court to the higher courts of the State; and in the course of such proceedings there is not, and can not be, a trial by jury—the hearing is had by the appellate court, upon the record of the Probate Court, without the intervention of a jury. There is much force in the argument, but we are unable to yield assent to it. The statute was passed soon after the adoption of the constitution, and, doubtless, with the intention of yielding obedience to, and executing the clause or provision under consideration. In its words, the statute is ambiguous; and if it is capable of a construction that will render it consistent with the constitution, affording to the citizen, or to corporations, the substantial rights the constitution intended to confer, that construction must be adopted. Every statute, it is the duty of the court so to construe, as to make it, if possible, harmonious with the constitution, without narrowing the inquiry to the construction which the natural import of the language used may bear. It is said by Judge Cooley: “The duty of the court to uphold a statute, where the conflict between it and the constitution is not clear, and the implication which must always exist, that no violation has been intended by the legislature, may require it in such cases, where the meaning of the constitution is not in doubt, to lean in favor of such a construction of the statute as might not, at first view, seem most obvious and natural.” “This is only saying,” he adds, “in another form of words, that the courts must construe the statute in accordance with the legislative intent; since it is always presumed the legislature designed the statute to take effect, and not be a nullity.”—Cooley Cons. Lim. (4th ed.) 223,

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top p. And in *Duroisseau v. United States* (6 Cranch 307), it was said by C. J. MARSHALL: "The spirit, as well as the letter of a statute, must be respected; and when the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent."

A close, literal construction, keeping within a narrow signification of its words, not reading it in connection with the constitution, or in connection with other statutes which, if not *in pari materia*, are subject to the same constitutional provision, and are intended to accomplish a like purpose, would render this statute vain and nugatory. There is no designation of the court to which the appeal may be taken, nor, in the event of an appeal, is there an expression of the mode of hearing or trial, except as it may be supposed to lie in the general words, "the same proceedings shall be had as in ordinary cases of appeal from the Probate to the higher courts of the State," if these words should be referred to the proceedings in the appellate court. But, if we keep in mind that the statute was intended, to be effectual, and to execute the constitutional provision, we must construe it as intended to authorize an appeal to a higher court than the Court of Probate, and to a court of which a jury is a constituent. Thus reading it, the Circuit Court of the county is the only higher court to which the appeal may be taken—it is the only court exercising appellate jurisdiction over the Court of Probate, having a jury as a constituent. The case reaching that court by appeal, the constitution intervenes, and, on the demand of either party, the damages must be assessed by a jury. It is true, that this construction renders it necessary to indulge some degree of implication; but it is not implication the words of the statute repel, and it is necessary to give effect to the spirit and intent of the statute, unless we presume that the legislature did not design it to be effectual. The general words, "the same proceedings shall be had as in ordinary cases of appeal from the Probate to the higher courts of this State," are not, under this construction, left unmeaning and without office to perform. They may well be referred to the proceedings preliminary to the taking of an appeal, the mode of taking it, and of introducing the case into the appellate court. All of these must conform to the usual, ordinary proceedings in cases of appeal from the Court of Probate.

Under this construction of the statute, the Circuit Court erred in quashing the proceedings in the first of these cases, but did not err in refusing to quash them in the second.

The railroad corporation is the actor in the institution of the proceedings, and if, upon an appeal to the Circuit Court, an assessment of the damages by a jury is demanded, we are of the

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opinion, it is entitled to open and conclude the investigation and argument of the cause. It has long been the settled practice in this State, that whatever may be the attitude a case may assume, the plaintiff, the actor in the institution of the proceedings, is entitled to open and conclude the investigation and argument, unless he waives the right of concluding by failing to open the argument.—*Grady v. Hammond*, 21 Ala. 427; *Chamberlain v. Gaillard*, 26 Ala. 504; *Pearsall v. McCartney*, 28 Ala. 110.

The result is, the judgment in the first case is reversed, and the cause remanded; and in the second, the judgment is affirmed.

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Action against Railroad Company, as Common Carrier, for Failure to deliver Freight.

1. *Who is proper party plaintiff.*—When a quantity of corn is delivered to a railroad company for transportation, the consignee having bought it and paid the freight on it, he is the proper party to sue for its non-delivery, and not the consignor from whom he bought it; but the evidence as to these facts being conflicting, the question is properly submitted to the decision of the jury.

2. *Measure of damages for failure to deliver freight.*—In an action against a railroad company as a common carrier, for a failure to deliver goods received for transportation, the measure of damages is the value of the goods at the place of destination.

3. *Same; proof of value of goods.*—In an action against a railroad company as a common carrier, to recover damages for its failure to deliver a quantity of corn, received by it for transportation from one intermediate station to another, about eighty miles apart, the value of the corn at the place of delivery to the railroad, at the time of its delivery, is relevant and competent evidence on the question of its value at the point of destination. (STONE, J., dissenting.)

4. *Impeaching witness by proof of former testimony.*—The statements contained in a bill of exceptions, reserved on a former trial, are not competent evidence to contradict the testimony of a witness on a subsequent trial.

APPEAL from the Circuit Court of Blount.

Tried before the Hon. LEROY F. BOX.

This action was brought by Edmund A. Wood, against the appellant, a domestic corporation, to recover damages for its failure to deliver a certain quantity of corn, delivered to the defendant, as a common carrier, at Bangor, a station on its road near Blountsville, to be delivered to L. K. Moss, at Jemison, another station about eighty miles distant. The action was

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commenced before a justice, on July 12th, 1876; and was removed into the Circuit Court by appeal, at the instance of the defendant. The case has been before this court on two former appeals, and may be found reported in 66 Ala. 167, and 71 Ala. 215. On the last trial, as shown by the bill of exceptions in the present record, numerous exceptions were reserved by the defendant, on which assignments of error are founded, eighteen in number; but the points decided by this court render it unnecessary to state the facts in detail.

SAMUEL F. RICE, and J. W. INZER, for appellant.

HAMILL & DICKINSON, *contra*.

STONE, J.—The present is an action against the railroad company, for an alleged failure to safely transport and deliver corn, placed in car at one of defendant's depots, and consigned, not to a regular depot, but to a siding which was not a depot, and at which the railroad company kept no agent; the distance to be transported being about eighty miles. The contract was, that the railroad would transport a car-load of corn in the shuck; and to this end, the company placed one of its cars at the depot of shipment, to receive the corn. When the loading was completed, the car was locked by the railroad's agent; and after it was placed on the siding at the destination, it was unlocked by one of the railroad's employees, at the request of the consignee. It is alleged that about one-fourth of the corn was lost in the transit. The complaint consists of a single count for the non-delivery of the corn. This case has been twice before in this court (66 Ala. 167; 71 Ala. 215); but the points decided on those appeals are not directly presented in this.

One question raised by the defense in this case is, that Wood, the plaintiff, was not the owner of the corn when the action was brought, but that Moss was, and should have been the plaintiff. The testimony on this question is not very clear, and appears to be somewhat confused. The bill of exceptions states that it contains all the evidence. One part of the testimony is emphatic, that Wood sold to Moss three hundred bushels of corn, to be delivered at Bangor in Blount county; and some of the witnesses testify that quantity was delivered in car at Bangor. Moss testifies he paid the freight on the car-load of corn, and had it consigned to him at Smith's mill siding. If this be the true and full version of the transaction, then the corn became the property of Moss, when it was delivered in car at Bangor; and if this be so, and if there are no qualifying facts in the transaction, then Moss alone could sue for the failure to deliver; for the corn was his, and the contract of affreightment

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was with him. But there is testimony not easily reconcilable with this. Wood, the plaintiff, testified that the corn, for which this action was brought, was his property, at and before the commencement of this suit; and Moss testified that he had no interest in the suit, nor in the corn sued for. This seeming discrepancy, if unexplained, is a question for the jury.—Benjamin on Sales, § 679; *Shealy v. Edwards*, at this term.

As we have said, the complaint in this case contains but a single count, alleging a breach of the railroad's contract to deliver the corn. There is no averment that the corn was not delivered in a reasonable time. When there is a contract to transport and deliver, the law implies that it shall be done in a reasonable time. What is a reasonable time, depends on the distance; and the nature and habits of the service. If there is a delivery, but not within a reasonable time, then the measure of damages is the injury resulting proximately from the delay; nothing more. There are no pleadings in this case, which raise the question of delay in delivery; nor, if there were, could such delay change the burden of proof as to when or where the corn was lost, if there was a loss. On the plaintiff would still rest the burden of making some proof that the corn, for the alleged loss of which this action was brought, was in the car when the same was turned over to the railroad's agent, and was not there when the car was placed on the siding at Smith's mill.—*S. & N. Railroad Co. v. Wood*, 71 Ala. 215.

The undisputed testimony is, that the corn was to be delivered by the railroad at Jemison, or Smith's mill, eighty miles from Bangor station, from which it was shipped. The rule can not be disputed, that, if there was a failure to deliver, the injury is the value of the corn at the place of destination. There it was wanted—there it was contracted to be delivered. In an action on a contract for the delivery of personal property at a particular time and place, the measure of damages is the value of such property at the time and place appointed for delivery, with interest for delay.—1 Brick. Dig. 524, § 27; 2 Greenl. Ev. § 261. The defendant offered to prove, on the question of damages, the value of the corn at Bangor, the place of shipment. This testimony was disallowed, and, I think, rightfully. My reasons are, first, that from the very nature of the commodity, corn must be of variable value, in places not far removed from each other; second, value at one place can furnish no reliable criterion for fixing value at another; and, third, it tends to confuse an ordinary mind, and to multiply the issues, by laying before the jury remote and indeterminate facts, and requiring a complex system of reasoning, at war with the simple rules of evidence. One of the fundamental laws of evidence is, that facts which shed some light on the matter in dispute

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can alone be given in evidence. You can not prove independent, disconnected facts, as a basis for instituting comparisons, or commenting on analogies.—1 Best Ev. §§ 87, 90 ; 1 Greenl. Ev. § 52; *Tanner v. L. & N. R. R. Co.*, 60 Ala. 621.

My brothers, however, differ with me, and hold that this testimony ought to have been admitted, as shedding some light on the question. They rely on *Foster v. Rodgers*, 27 Ala. 602; and *Ward v. Reynolds*, 32 Ala. 384, in support of their views. The first of those cases cites no authority in support of it, and the last cites only the first. The first arose on the value, and comparative value of certain grades of cotton. The cotton was sold by sample, in Alabama; and testimony was received of the comparative value in New Orleans, to which place it had been shipped. This court, in declaring the evidence admissible, stated, among other things, that the evidence showed "that the relative value of the two cottons was the same in Montgomery and at New Orleans." The value of cotton, all over the country, is regulated by the price at New York, or Liverpool; and, making allowance for transportation and its incidents, the price of any given grade at one place, is substantially the price at all others.

In *Ward v. Reynolds*, the question arose on the value of a slave, at that time a species of property, and probably of uniform value throughout the State. I doubt the soundness of both decisions; and even if sound, I think the principle should not be extended to such a commodity as corn, or any other article of commerce of such varying and fluctuating value.

The bill of exceptions taken on the former trial, offered as evidence to contradict what some of the witnesses testified to on the last trial, was rightfully rejected. It was not a document or writing made by the witness, nor submitted to him for correction. It was not evidence for such a purpose, even if a proper predicate had been laid.—2 Brick. Dig. 548, §§ 117, 118.

Paragraph numbered 2 of the charge given by the court of its own motion, is not reconcilable with the views expressed above; and charges numbered 2, 3, 7, 10, 11, 14, asked by defendant, should each have been given. Charges numbered 1, 4, 8, 12, 13, are, some of them, involved, and others argumentative, and should not have been given. Charges 5 and 6 were rightly refused.

Reversed and remanded.

[Thompson v. Gordon.]

Thompson v. Gordon.*Bill in Equity by Purchaser, for Specific Performance of Contract for sale of Land.*

1. *Contract for sale of lands; sufficiency of description.*—A written agreement to sell “forty acres of land,” without other descriptive words, is void for uncertainty.

2. *Parol evidence removing ambiguity, and identifying land sold.*—As to the sufficiency of the parol evidence adduced in this case, showing the particular tract of land of which the purchaser was placed in possession, and thereby removing the uncertainty and ambiguity of description contained in the written contract, the court expresses no opinion, but cites the following cases: *Chambers v. Ringstaff*, 69 Ala. 140; *Ellis v. Burden*, 1 Ala. 458; *Mead v. Parker*, 115 Mass. 413; *Holmes v. Evans*, 48 Miss. 247.

3. *Bill for specific performance; when prematurely filed.*—A bill for specific performance is prematurely filed by the purchaser, when the purchase-money has not been paid, and, by the terms of the contract, is not due until a future day; as where the contract stipulates that the vendor “is to give him three years to pay, without interest,” and is not bound to convey until the purchase-money is paid, and the bill is filed before the expiration of the three years.

APPEAL from the Chancery Court of Lowndes.
Heard before the Hon. JOHN A. FOSTER.

J. F. CLEMENTS, for appellant.

HOUGHTON & TYSON, *contra*.

SOMERVILLE, J.—The bill is for specific performance of the following written agreement: “I, T. T. Gordon, do agree to sell Rufus Thompson *forty acres* of land, at three dollars per acre, and to give him *three years* to pay for it, without interest.” The vendee was placed in possession of a certain forty acres of land, which he describes in the bill, as the tract intended to be sold him. The agreement was dated February 23, 1880; and the bill was filed in June, 1882. The offer is made by complainant to pay the purchase-money, “when the same shall be due,—the time of payment not having arrived at the commencement of suit.

The agreement, on its face, is manifestly void for uncertainty in the description of the land. But we need not decide that the parol evidence, showing that the vendee was placed in possession of the premises, was not sufficient to remove this ambiguity, by extrinsic identification of the subject-matter of sale.

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Chambers v. Ringstaff, 69 Ala. 140; *Ellis v. Burden*, 1 Ala. 458; *Mead v. Parker*, 115 Mass. 413; s. c., 15 Amer. Rep. 110; Fry on Spec. Perf. § 166; *Waterman Spec. Perf.* § 236; *Holmes v. Evans*, 48 Miss. 247; s. c., 12 Amer. Rep. 372.

The chief point of defect is, that the bill is filed prematurely. The agreement does not contemplate a conveyance of the land, until the purchase-money was paid by the vendee. The complainant prays for specific performance, at a time when the vendor could not have been compelled to receive the purchase-money, had it been tendered; and he only offers to pay when the same "shall be due,"—which was not until about eight months after the bill was filed.

We need discuss none of the other grounds, upon which we think the decree of the chancellor dismissing the bill can be sustained.

The decree is affirmed.

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Bill in Equity for Injunction against Obstruction of Navigable River.

1. *Injunction against obstruction of navigable river.*—The obstruction of the navigation of a public, navigable river, is a public nuisance, which a court of equity will enjoin and restrain at the instance of a citizen who is suffering, or will suffer irreparable injury.

2. *What streams are navigable.*—All tidal streams are, *prima facie*, public and navigable; and all streams above tide-water, not treated as navigable in the surveys made under the authority of the United States, are, *prima facie*, private, not navigable, and not subject to a public right of floatage.

3. *Same; question of law and fact.*—Whether a stream is navigable or not, is a mixed question of law and fact; but, when the facts are ascertained, it becomes a question of law.

4. *Same; judicial knowledge.*—The court judicially knows that there are no tidal streams in Jackson county; and Paint-Rock river is, *prima facie*, not a public, navigable stream.

5. *Same; burden of proof, and sufficiency of averments.*—When a party claims that a stream above tide-water, which was not treated as navigable by the United States surveyors, is in fact public and navigable, the *onus* of proof rests on him; and he must also state facts from which the court can draw the conclusion that the stream is navigable. An averment in the bill that the stream "is a navigable river," is merely the statement of a legal conclusion; and, coupled with the additional averment that complainant has used it, for the floatage of saw-logs, for a period of eighteen months before the filing of his bill, without more, is not sufficient to show that the stream is navigable.

6. *What constitutes navigable stream.*—Every stream which, in its

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natural state, and with its ordinary volume of water, is capable of being used for the purposes of commerce, for the transportation of the products of the fields, forests or mines on its banks, in a marketable condition, is public for the purposes of navigation; and it is not necessary that the ordinary state of the waters should render them navigable continuously at all seasons of the year.

APPEAL from the Chancery Court of Jackson.

Heard before the Hon. N. S. GRAHAM.

The appeal in this case is sued out from a decree overruling a demurrer to the bill, and also overruling a motion to dissolve the injunction and dismiss the bill for want of equity. The opinion states all the material facts.

R. C. HUNT, and ROBINSON & BROWN, for appellant.

L. P. WALKER, *contra*. (No briefs on file.)

BRICKELL, C. J.—The original bill, filed by the appellee, seeks an injunction restraining the defendant from constructing a boom across a stream in Jackson county, known as *Paint-Rock* river. It is not averred that from the construction of the boom any injury will result to the property, or to the rights of property of the complainant; that he owns lands on or adjacent to the stream, which will be overflowed; or that there will be a diversion of the flow of the water from its natural current, which will cause him detriment. The *gravamen* of the complaint is, that the navigation of the stream will be obstructed, and the complainant hindered in its use for the floatage of saw-logs from points above, to a saw-mill on the stream below the boom. If the stream is a navigable river—a public highway, open and free to the reasonable uses of all citizens for passage or transportation—the obstruction of its navigation is a public nuisance, which a court of equity will interfere to prevent or restrain, at the instance of a citizen who is suffering, or will suffer, special, irreparable injury from its erection or continuance.

The first question presented by the demurrers is, whether it appears from the allegations of the bill that the stream is a navigable stream, or river, upon which the public have a right of way. The tests by which it is determined whether a stream is navigable, subject to public use, have been distinctly stated in several of our decisions.—*Bullock v. Wilson*, 2 Port. 436; *Ellis v. Carey*, 30 Ala. 725; *Rhodes v. Otis*, 33 Ala. 578; *Peters v. N. O., M. & C. R. R. Co.*, 56 Ala. 528. It is not the ebb and flow of the tide, which, as in England, constitutes the usual, or, it may be said, any test at all of the navigability of waters, by which we mean their subjection to public use. The

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test is the adaptability of the waters to the purposes of navigation; whether they are, or in fact have been, used by the public, or are capable of being used, in their natural condition, as highways for commerce; for trade and travel; for the transportation of the products of the country, of its industries, of its fields, forests, or mines, in the customary modes of such transportation. All tidal streams are, *prima facie*, public and navigable; all streams above-tide-water, if in the survey of the public lands by the United States they have not been treated as navigable, fractional sections made upon their margin, and the bed reserved from grant or sale, are *prima facie*, private—not navigable, and “not subject to a public right of floatage upon them.” Upon the party claiming for such streams the character of public and navigable, rests the *onus probandi*, and the duty of stating the facts from which the court can draw the conclusion that the stream or water is of the character claimed for it.

When the facts are ascertained, whether a stream or water is navigable, is a question of law. The whole question is a mixed question of law and fact.—*Rhodes v. Otis, supra*. In this case, the court said; “In determining the character of a stream, inquiry should be made as to the following points: whether it is fitted for valuable floatage; whether the public, or only a few individuals, are interested in its transportation; whether any great public interests are involved in the use of it for transportation; whether the periods of its capacity for floatage are sufficiently long to make it susceptible of use beneficially to the public; whether it has been previously used by the people generally, and how long it has been so used; whether it was meandered by the government surveyors, or included in the surveys; whether, if declared public, it will probably in future be of public use for carriage.”

The bill contains no more than the averment that the stream is a *navigable river*, and that for a period of eighteen months before its filing the complainant had used it, from points above the point at which the defendant threatens to construct the boom, for the floatage of saw-logs to a saw-mill below it. There is no averment that it had been at any previous time used for the purposes of transportation, or of floatage; of the distance for which it is capable of use, nor of the seasons or periods of the year when it is capable of use. Nor is there any averment that there are large and extensive forests contiguous to the stream, fitted for furnishing marketable lumber, inducing a continuous business of transporting logs or timber upon it. There is the simple averment, that the stream is a *navigable river*. We know judicially that within the limits of Jackson county there are no tidal streams, which are *prima facie* navigable and public—that all its streams are fresh water, and *prima facie*

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private.—*Lewis v. Harris*, 31 Ala. 689; *City Council v. M. & W. Plank-Road Co.*, *Id.* 76. The bill avers, consequently, a legal conclusion, omitting an averment of the facts from which it can be drawn by the court. Such an averment is insufficient, and rendered the bill obnoxious to the several causes of demurrer numbered from one to five inclusive. "It is a cardinal rule," said the court in *Duckworth v. Duckworth*, 35 Ala. 70, "founded in reason and good sense, that a bill must show the complainant's claim or title to relief with accuracy and clearness, and with such certainty that the defendant may be distinctly informed of the nature of the case which he is called on to meet; matters essential to the complainant's right to relief must appear, not by inference, but by direct and unambiguous averment."

In view of the meagre statements of the bill, and of the possibility that by amendment a case may be made of equitable cognizance, we forbear a discussion of other questions raised by the assignments of error. The true rule, that which is deducible from our former decisions, to which we have referred, and by which the right of the complainant must be determined, is, that every stream which, in its natural state, and its ordinary volume of water, is capable of being used for the purposes of commerce, of transportation of the products of the fields, forests, or mines upon its banks, in a marketable condition, is for the purposes of navigation to be deemed public—upon its waters the public have a right of way, or easement, which is superior to the right of the riparian proprietor, though he may own the soil of the bed. It is not essential that continuously, at all seasons of the year, the ordinary state of the waters should render them navigable—it may be subject to periodical fluctuations, attributable to natural causes, recurring as regularly as the seasons; and if its periods of navigability continue a sufficient length of time to make it of public use as a highway, then it is subject to public uses.—*The Daniel Ball*, 10 Wall. 557; *The Montello*, 20 Wall. 430; *Morgan v. King*, 18 Barb. 277; s. c., 35 N. Y. 454.

The chancellor erred in overruling the causes of demurrer numbered from one to five, inclusive; and for the error the decree must be reversed, and the cause remanded.

[Strang v. Moog.]

Strang v. Moog.*Ejectment by Mortgagee against Mortgagor.*

1. *Conclusiveness of decree dismissing bill.*—When a bill in equity is dismissed for want of jurisdiction, or because the complainant has a plain and adequate remedy at law, or because of any mere defect in the pleadings, or, generally, on any other ground not involving the merits, such dismissal is usually stated to be “without prejudice,” and is not held to be a final and conclusive adjudication of the matters in litigation; but, when a bill is dismissed on the merits, the decree is final and conclusive, like a judgment at law, not only as to all facts or issues actually decided, but as to all points necessarily involved in the matter adjudicated.

2. *Res adjudicata, at law and in equity.*—In the application of the principle of *res adjudicata*, there is no difference between courts of law and courts of equity: when an issue of fact, or of law, has been adjudicated on the merits in either tribunal, it can not be again litigated in the other.

3. *Dismissal of bill by plaintiff.*—By the 31st Rule of Chancery Practice (Code, p. 166), which follows the English rule, if the complainant cause his bill to be dismissed on his own application, after the cause is set down for hearing, “such dismissal is, unless the court otherwise orders, equivalent to a dismissal on the merits, and may be pleaded in bar to another suit for the same matter.”

4. *Conclusiveness of decree dismissing bill.*—When a bill assails the validity of a mortgage on the ground that the consideration was an illegal agreement to suppress a criminal prosecution, a decree dismissing it on the merits, because the proof failed to sustain the allegations, is conclusive as to that issue; and it can not be again litigated in an action at law founded on the mortgage.

5. *When mortgagee may maintain ejectment; demand, or notice to quit.* After the law-day of a mortgage, default having been made in the payment of the secured debt, the mortgagee may maintain ejectment for the property, without a previous demand, or notice to quit first given to the mortgagor.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

This action was brought by Bernard Moog, against Mrs. Julia A. Strang, to recover certain lots or parcels of land in the city of Mobile, particularly described in the complaint; and was commenced on the 13th May, 1882. The complaint contained a count on a demise from said Bernard Moog, who derived title under a mortgage executed to him by Mrs. Strang, the defendant, and a count on a demise from M. J. Goldsmith, who claimed as purchaser at a sale made under a power in the mortgage; but, as the bill of exceptions states, “the sale being void, on account of the insufficiency of the advertisement, the court stated that the plaintiff must recover, if at all, on the title of Moog as mort-

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gagee, and to this title alone the charge in this case was directed."

On the trial, the plaintiff read in evidence the mortgage executed to said B. Moog by the defendant, which was dated 1st July, 1878, and conveyed the lots now sued for, with power of sale, as security for the payment of a promissory note for \$3,841, executed by Dudley Hubbard, of even date with the mortgage, and payable two years after date, to said B. Moog or order, at the Bank of Mobile. "Plaintiff then proved that said mortgage debt was still due and unpaid, and that said defendant was in possession of the lots sued for at the time said mortgage was made; also, the value of the use and occupation from the commencement of the suit. Plaintiff having rested his case upon this evidence, the defendant's counsel announced to the court that he proposed to establish the following two defenses: 1st, that the said mortgage to Moog was void, because the only consideration upon which it was based was an agreement made by said Moog to suppress a criminal prosecution; 2d, that said mortgage was void, on account of a fraud in its execution, which said Moog had devised and accomplished. At this stage of the proceedings, plaintiff offered in evidence a transcript of the proceedings in a certain cause decided in the Supreme Court of Alabama, wherein Bernard Moog was appellant, and said Julia A. Strang was appellee, as *res adjudicata* of the issues therein decided; which issues, plaintiff claimed, embraced the two defenses which defendant proposed to make in this case. Said transcript is made a part of this bill of exceptions, marked *Exhibit C*. Defendant objected to the introduction of said transcript for the purpose for which it was offered, or for any purpose; which objection the court overruled, after argument, and admitted said record as *res adjudicata* of all issues decided by it; to which ruling the defendant excepted."

The transcript of the cause shown by the exhibit was the case of *Moog v. Strang*, reported in 69 Ala. 98-102. The bill in that case was filed by Mrs. Strang for the purpose of obtaining a cancellation of the said mortgage, on the ground that its execution was procured by undue influence, and duress *per minas*; and that its only consideration was an illegal agreement, in which Moog participated, to suppress a criminal prosecution against said Dudley Hubbard, who was the son-in-law of Mrs. Strang. Hubbard had been the cashier of the National Commercial Bank of Mobile, and Moog was one of the sureties on his bond. In May, or June, 1878, it was ascertained that Hubbard was a defaulter to the bank, to the amount of nearly \$10,000; and in the settlement of the controversy growing out of this matter, Moog advanced to Hubbard, or to the bank for him, the amount for which Hubbard executed his said note, and Mrs. Strang exe-

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cuted the mortgage to secure its payment. The prayer of the bill was in these words: "In consideration of the premises, your oratrix prays that your honor will declare the said mortgage to be null and void, for the reason that your oratrix was forced to execute the same under duress and undue influence, which she had no power to withstand; or, if your honor should not consider this a sufficient reason for annulling said mortgage, that your honor will declare the same to be void, because the only consideration upon which it was based was illegal, both by the statute and the common law; and your oratrix prays that your honor will remove said mortgage, as a cloud upon the title of your oratrix;" and for other and further relief, under the general prayer. There was a demurrer to the bill, which was overruled; and on final hearing, on pleadings and proof, the chancellor held the complainant entitled to relief as prayed, and rendered a decree declaring the mortgage null and void; but this court, on appeal, reversed his decree, and dismissed the bill, as shown by the report of the case. The opinion of this court was not included in the transcript.

"After said record had been so admitted in evidence, the defendant's counsel announced, that he proposed to prove that said mortgage was void, because of fraud in its execution; and in support of this issue, defendant began by offering evidence of the mental *status* of said defendant at the time said mortgage was executed. The court admitted this evidence, saying that the question whether, at the time of the execution of the mortgage, the defendant was *non compos mentis* or not, was not adjudicated in the said record offered by plaintiff. After all the evidence upon this question had been introduced, the defendant proposed to prove by A. A. Winston, the president of the National Commercial Bank, who was on the stand as a witness for her, that Dudley Hubbard had resigned as cashier of said bank. To this question plaintiff objected, on the ground that it was irrelevant. The court then asked the defendant to show its relevancy; and the defendant said, that she expected to prove fraud in the execution of the deed, in this way: first, that her mind was greatly weakened by age, if not entirely gone, and that said Moog, while she was in that condition, devised and concocted with said bank a deliberate scheme or design to defraud her, by forcing her, by threats of prosecuting said Hubbard, into the execution of the mortgage in question; and that the question addressed to Winston was intended to bring out the starting point of such conspiracy. The court then sustained plaintiff's objection to the question, and the defendant excepted."

"After the main charge in the case had been given, the defendant requested the following charge, which was in writing: 'The plaintiff in this case claims as mortgagee, and must recover

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as such, if at all. He has failed to prove that he gave any notice to quit to Mrs. Strang, the defendant, before the bringing of this suit. I therefore charge you, that, unless this notice was given before the bringing of the suit, Moog can not recover in this case.' The court refused to give this charge, and the defendant excepted to its refusal."

The rulings of the court on the evidence, to which exceptions were reserved, and the refusal of the charge asked, are now assigned as error.

HANNIS TAYLOR, for appellant.—(1.) The doctrine of *res adjudicata* only applies where the controversy is between the same parties, or their privies, and the issues involved are identically the same.—*Boyd v. The State*, 53 Ala. 614; *Wells' Res Adjudicata*, 308–09. The object and purpose of the chancery suit was simply the removal of the mortgage as a cloud on the complainant's title, and the title itself was not adjudicated; nor could it have been adjudicated, since the court had no jurisdiction over that question.—*Bennett v. Holmes*, 1 Dev. and Bat. 486; *Fulton v. Hanlon*, 20 Cal. 451; *Phelps v. Harris*, 51 Miss. 789; *Phelps v. Harris*, 11 Otto, 370, and cases there cited. When a party seeks to enforce a strictly legal right or title in a court of equity, when his remedy is at law, the dismissal of his bill is merely a declaration that he has no equity, but decides nothing and concludes nothing as to his legal title.

Wright v. Deklyne, 1 Peters, C. C. 198; *Pleasants v. Clemments*, 2 Leigh, 474; *Burchet v. Faulkner*, 1 Dana, 99; 4 Phil. Ev. (C. and H. Notes), 9, note 12. (2.) The evidence offered to prove fraud in the execution of the deed, was excluded by the court, on the ground that the issue had already been adjudicated in the chancery suit; and therein, it is insisted, the court erred. Fraud in the execution of a deed—as where it is procured by duress, or by false and fraudulent practices—renders it void at law, as well as in equity.—*Swift v. Fitzhugh*, 9 Porter, 63; *Mordecai v. Tankersly*, 1 Ala. 102; *Morris v. Harvey*, 4 Ala. 305; *Thompson v. Drake*, 32 Ala. 103; *Kennedy v. Kennedy*, 2 Ala. 592; *Jackson v. Hill*, 8 Cowen, 290; *Jackson v. King*, 4 Cowen, 207; *Bright v. Eynon*, 1 Burr. 396. The proposed evidence made out a clear case of fraud in the execution of the instrument, within the cognizance of a court of law; while the issue in the chancery suit was undue influence, an issue which could not be decided in a court of law. In fact, the validity of the execution of the mortgage has never been considered in any court; and it is the defendant's undoubted right to have it passed on by a jury. (3.) As to the necessity of notice to quit, before the mortgagee can maintain ejectment, the following authorities are relied on: Wade on

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Notice, §§ 589, 599; *Jackson v. Hopkins*, 18 John. 487; *Carr v. Green*, 4 John. 186; *Jackson v. Laughead*, 2 John. 74.

GREG. L. SMITH, with whom was J. L. SMITH, *contra*.—(1.) One of the grounds on which the mortgage was attacked in the chancery suit was the illegality of its consideration—that it was founded on an agreement to suppress a criminal prosecution; and that is one of the grounds on which the validity of the mortgage is here assailed. As to this issue, the decree in the chancery suit is conclusive.—*Trustees v. Keller*, 1 Ala. 406; *Mervine v. Parker*, 18 Ala. 241; *Hopkins v. Shelton*, 37 Ala. 306; *Gilbreath v. Jones*, 66 Ala. 129; *Strauss v. Meertief*, 64 Ala. 299; *Hutchinson v. Dearing*, 20 Ala. 798; *McDonald v. Life Insurance Co.*, 65 Ala. 358; *Cargile v. Ragan*, 65 Ala. 287; *Bohe v. Stickney*, 36 Ala. 483. The principle of *res adjudicata* applies to every issue of fact necessarily involved, or actually litigated and determined.—*Chamberlain v. Gaillard*, 26 Ala. 504; *Strauss v. Meertief*, 64 Ala. 299; *Gilbreath v. Jones*, 66 Ala. 129. The former case between these parties, as shown by the transcript offered in evidence, and also by the printed report of the case, was not decided on the ground that there was no equity in the bill, but on the ground that the proof did not sustain the allegations—that, on each of the issues of fact presented by the pleadings, the complainant had failed to make out her case; and therein lies the difference between this case and those cited for appellant. (2.) The testimony proposed to be elicited from the witness Winston, as stated in the bill of exceptions, has no relevancy to the question of fraud in the execution of the mortgage; and its relevancy not being shown, the court did not err in rejecting it.—*Stewart v. The State*, 63 Ala. 109; *Bynum v. So. Pump Co.*, 63 Ala. 465. If its relevancy to the question of fraud had been shown, the evidence would have been inadmissible, because the decree in the former suit was conclusive as to that issue.—Authorities above cited. (3.) Notice to quit is not necessary, to enable the mortgagee to maintain ejectment.—1 *Jones on Mortgages*, § 719; *Keech v. Hall*, Doug. 21; *Lyman v. Mower*, 6 Vermont, 345; *Wilson v. Hooper*, 13 Vermont, 653; 26 Illinois, 9.

SOMERVILLE, J.—The rule is everywhere settled, that where a decree is rendered by a court of equity, dismissing a bill for *want of jurisdiction*, or because the complainant has a plain and adequate *remedy at law*, or because of any mere defect in the pleadings, or, we may say generally, on any other ground not involving *the merits* of the cause, such dismissal is usually stated to be “without prejudice,” and is not held to be a final and conclusive adjudication of the matters in litigation,

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so as to come within the doctrine of *res adjudicata*.—Freeman on Judg. § 270; *McCall v. Jones*, at present term, *ante*, p. 368.

And the rule is equally as well established, that, where a decree has been rendered, dismissing a bill on *the merits* of a case, it is “final and conclusive, not only as to all facts or issues actually decided, but upon all points which were necessarily involved in the matter adjudicated.”—*McDonald v. Mobile Life Ins. Co.*, 65 Ala. 358; 1 Greenl. Ev. § 528; Wells’ *Res Adjudicata*, § 217.

There can be, and is no difference, in the proper application of this principle, between a judgment at law and a decree in chancery. The theory upon which the doctrine of *res adjudicata* rests is, that public policy, as well as natural justice, favors the putting of an end to litigation. It is a wrong to the State, as well as to the litigant, that one should be twice harassed for the same cause of action. Hence the rule obtains, that where an issue has been settled by an adjudication on *the merits*, in a court of equity, the same issue, whether of law or fact, can not be again re-litigated in a court of law; and *e converso*, where it has been tried at law, it can not be tried again in a court of equity; provided the court, in each case, have jurisdiction of the subject-matter and of the parties litigant.—Freeman on Judg. § 248; *Wilkins v. Judge*, 14 Ala. 135.

It was accordingly decided, in *Smith v. Kernochen*, 7 How. (U. S.) 198 (s. c., 17 Curtis, 90), that, if the validity of a mortgage be tried and adjudicated in a suit in chancery, the decree binds parties and privies in an action of ejectment founded on the same mortgage. And in *Wilkins v. Judge*, 14 Ala. 135, *supra*, this court held that, where the question of fraud *vel non*, in a contract for the sale of slaves, was decided adversely to the vendor in a court of *law*, having competent jurisdiction, the same issue could not be re-litigated by him in a court of *equity*.

Under the modern rules of chancery practice, it is not left in doubt as to what constitutes a dismissal on the merits. Our 31st Rule of Chancery Practice (Code, 1876, p. 166), which adopts the prevailing English rule, reads as follows: “If the complainant, after the cause is set down to be heard, cause the bill to be dismissed, on his own application, or if the cause is called on to be heard in court, and complainant makes default, and by reason thereof the bill is dismissed; then, and in such case, such dismissal, unless the court otherwise orders, *is equivalent to a dismissal on the merits*, and may be pleaded in bar to another suit for the same matter.” This rule, it will be noticed, is embodied in substantially the same language as that used in Daniell’s Chancery Pleading and Practice.—1 Dan. Ch. Pl. & Prac. (5th ed.) p. 659.

The present action is one of ejectment by a mortgagee against

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the mortgagor. The only evidence of title relied on by the plaintiff in ejectment is the mortgage itself, which shows that the mortgagor has made default.

The defendant seeks to defend by assailing the validity of the mortgage on two grounds: (1.) That the consideration of the mortgage was an agreement to suppress a criminal prosecution against one Hubbard, for whose debt the mortgage was given as security. (2.) That its execution was obtained by duress *per minas*, practiced by the mortgagee and others upon the mortgage debtor, and through him on the mortgagor.

The mortgage had been previously assailed, by a bill in equity, filed by the mortgagor, identically upon the *first* of the above grounds. There was no question about the equity of this bill, or the jurisdiction of the court. The cause was tried on its merits, and was dismissed, only because of the fact that the proof failed to sustain the allegations of the bill. The bill was not dismissed for *want of equity*, as erroneously assumed by appellant's counsel; and in this particular the cases cited by him present a total lack of analogy to the one here under consideration.

Under the principles which we have above discussed, it is clear that the decree of dismissal was admissible in the ejectment suit, as evidence of, the fact that the first issue, as to the illegal consideration of the mortgage, had been already determined. There was no error in the court's ruling, that it was final and conclusive as to this particular issue, being *res adjudicata*.

There was no error in excluding the evidence as to Hubbard's alleged resignation, as cashier of the bank. It is not shown that there was any manifest connection between the principal issue in controversy and this collateral fact introduced to sustain it. The defendant proposed to prove, that she had been induced to execute the mortgage by reason of duress exerted through threats of prosecuting Hubbard criminally on the part of Moog, the mortgagee, and the bank officers. It is not shown, or intimated, that there was any connection whatever between these threats and Hubbard's resignation, or that he was induced to resign because of the threatened prosecution. The proposed evidence was clearly irrelevant.—*Brewer v. Watson*, 65 Ala. 88, 90; 1 Greenl. Ev. § 52; 1 Best Ev. §§ 90, 251-2.

The action being one of ejectment by a mortgagee against a mortgagor, after the law-day of the mortgage, it could be maintained without previous demand by the plaintiff, or notice to quit being first given to the defendant. This is the English rule, and seems to be the prevailing doctrine in this country, outside of the State of New York.—1 Jones' Mortg. § 719; *Allen v. Ranson*, 44 Mo. 263; *Carroll v. Ballance*, 26 Ill. 9;

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Doe v. Giles, 5 Bing. 88; *Doe v. Olley*, 12 Ad. & Ell. 481; *Pierce v. Brown*, 24 Vt. 165; 3 Wait's Act. & Def. p. 51; Tyler on Eject. 50-51.

We discover no error in the record, and the judgment of the Circuit Court is affirmed.

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Bill in Equity for Specific Performance of Contract.

1. *Specific performance of contract; when decreed.*—A court of equity will not decree the specific execution of a contract, unless it is fair, just, reasonable, and equal in all its parts; it must also be founded on an adequate consideration, and be mutual in its operation and effect; and its specific execution must effectuate the real intention of the parties, and must be free from any hardship or oppression.

2. *Same.*—There is no other class of cases, within the jurisdiction of a court of equity, to which the maxim is more rigidly applied, that he who seeks equity must do equity; and hence, where a specific performance could not be decreed against the party asking it, it will not be decreed in his favor, but the parties will be left to their legal remedies.

3. *Presumption as to common law.*—In the absence of proof to the contrary, our courts will presume that the common law prevails in Pennsylvania, Illinois, or any other State having a common origin with our own.

4. *Renunciation of marital rights by husband.*—At common law, the husband might renounce his marital rights in and to his wife's property; and the effect of such renunciation was, that the property became the equitable estate of the wife, as if he had first reduced it to possession, and then made a gift of it to her.

5. *Wife's equitable estate; how affected by change of domicile.*—When the wife is possessed of an equitable separate estate in property which accrued to her elsewhere, the character of her estate is not changed by the removal of herself and husband to this State, bringing the property with them, and the acquisition of a domicile here; and on her subsequent death intestate, the title and ownership of the property devolve upon her personal representative or heirs at law, to the exclusion of the husband.

6. *Specific performance refused, for want of mutuality; special relief granted by subrogation to discharged mortgage.*—Where a married woman advanced to her father, either as a loan, or in trust to be invested for her benefit in a tract of land, moneys belonging to her as an equitable separate estate, which he used in part payment of the purchase-money for the land, but took the title in his own name; and dissatisfaction being expressed by the daughter and her husband, because the title was so taken, and because there was no written evidence of her interest in the land, or that her money was used in paying for it; thereupon, after the death of the wife and daughter, the father agreed in writing with the surviving husband, "in consideration," as therein recited, "of having given my late daughter certain money, part of which she returned to me at or shortly after I purchased" the lands, to convey a specified part of the lands to the husband, with half of his stock, farming implements, &c., on condition as follows: "he to pay off the mortgage for \$3,000 that now stands against the property, and, if judgment is obtained against me in a suit now pending in favor of R. & Co., to pay one-half the amount thereof; he

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to lift the mortgage within the present year, and I to make him a deed to the property when is prepared to lift the mortgage;" *held*, on bill filed by the husband after paying the mortgage, that he was not entitled to a specific performance of the contract, since he could not discharge the defendant from liability for the moneys so invested in the lands, and therefore the contract could not be enforced against him; *held*, also, that he was entitled to be subrogated to the rights of the mortgagee, to the extent of the moneys paid by him in satisfaction of the mortgage.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. H. C. SPEAKE, as special referee under the statute approved February 23d, 1881.—Session Acts 1880–81, p. 66.

The bill in this case was filed on the 10th January, 1878, by Samuel A. Bailey, against William C. Irwin; and sought the specific performance of a written contract or agreement signed by the defendant, which was in these words: "Know all men by these presents, that I, William C. Irwin, of Madison county, State of Alabama, in consideration of having *gave* to my late daughter, Mary Bailey, certain *monies*, part of which she returned to me at or shortly after the time I purchased the farm on which I now reside, have agreed to *deed* to Samuel A. Bailey the following tracts of land, they being a part of said farm," particularly describing the lands, which were said to contain 480 acres, "on the following conditions: he, the said Bailey, to pay off the mortgage for \$3,000 that now stands a lien against my property, and if judgment is obtained against me in a suit now pending, wherein Rowland & Co. are plaintiffs, he to pay one-half the amount; he to lift the mortgage within the present year, and I to make him a deed for the properties when he is prepared to lift the mortgage, and to give him possession of the properties at the end of the year, or as soon as the crops are gathered and taken off that I may have planted on them the present year. I also agree to give him one-half of my live-stock and farm implements, reserving the mower, rake, huller, two-horse wagon, and cart. Witness my hand and seal, this 12th January, 1877." On final hearing, on pleadings and proof, the special chancellor, or referee, to whose decision the cause was submitted by agreement of record, held that the complainant was entitled to a specific performance as prayed, and rendered a decree to that effect; and his decree is now assigned as error.

WALKER & SHELBY, for the appellant. (No brief on file.)

HUMES, GORDON & SHEFFEY, *contra*.—The grounds of defense set up in the answer are, that the agreement "was procured from respondent, by complainant, under misrepresentation."
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tions and fraud, and was inequitable and unjust, both to respondent and to complainant's daughter, who is respondent's grand-daughter;" and that said agreement "is exorbitant in its terms, extortionate in its demands, iniquitous, and contrary to good conscience." In other words, the defenses are—1st, inadequacy of consideration; 2d, fraud, misrepresentation, and imposition. If neither of these defenses is established, the right to a specific performance is not matter of discretion, but of legal right.—*Bogan v. Daughdrill*, 51 Ala. 314. In determining the adequacy of the consideration, the court must look to the agreement; and in ascertaining the intention of the parties, must consider the nature of the agreement, the condition of the parties executing it, and the objects they had in view.—*Strong v. Gregory*, 19 Ala. 146. It is not necessary that the consideration should be expressed formally and precisely, if it is so expressed that a person of common sense would understand it. *Browne on St. Frauds*, § 399. Where a sufficient legal consideration is expressed, its inadequacy is not a ground for refusing a specific performance of the contract.—*Goodlett v. Hansell*, 66 Ala. 151. There being no proof of fraud, mistake, or imposition, the court will not inquire into the adequacy of the consideration, but will adopt the estimate of the parties, who were fully competent to transact their own business, and acted with full knowledge of all the facts. It may be uncertain whether Bailey had such an interest in the property, as could be enforced by him; yet he claimed and asserted such right, and was threatening suit to enforce it; and the compromise and settlement of this claim, by which the trouble, vexation, delay, annoyance, and costs of a law-suit were avoided, was a sufficient consideration to uphold the agreement. But, on the facts proved, Bailey's marital rights had attached to the bonds and money of his wife, the common law being presumed to prevail in Pennsylvania and Illinois; and his rights were not affected by the change of domicile.—*Castleman v. Jeffries*, 60 Ala. 380; *Drake v. Glover*, 30 Ala. 382; *Doss v. Campbell*, 19 Ala. 50; 1 Bishop's M. W. §§ 602, 605; 2 *Ib.* §§ 565–6; Story's Conflict of Laws, § 558. The common law favored the husband's marital rights, and required that an intention to exclude them should be clearly manifested.—*Lamb v. Wragg*, 3 Porter, 82; *Johnson v. Johnson*, 32 Ala. 639; *Pollard v. Merrill*, 15 Ala. 173; *Moore v. Jones*, 13 Ala. 303. Nor were his rights affected by permitting his wife to retain possession.—*Hopper v. McWhorter*, 19 Ala. 229; *Bell v. Bell*, 37 Ala. 541. Even if the court should hold that Mrs. Bailey had an equitable estate in the land and stock investment in Alabama, yet, on her death intestate, her surviving husband became entitled to a valuable portion of it.—*Marshall v. Gayle*, 58 Ala. 284; *Smoot v. Lecatt*, 1 Stew-

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art, 602; *Bernstein v. Humes*, 60 Ala. 582. The rights and interests of Helen Bailey, the daughter of the complainant, and grand-daughter of the defendant, are not involved in this suit, and can not be affected by its result; since she is not a party, and the complainant, if entitled to a decree, can acquire no other or greater interest than the defendant has.—*Bogan v. Daughdrill*, 51 Ala. 314; 2 Parsons on Contracts, 382; 2 White & Tudor's L. C. Eq., p. 1144; Fry on Spec. Perf. §§ 299, 300. Finally, the appellee invokes the principle often declared by this court, in revising decrees in chancery, that the chancellor's decree must stand unless it clearly appears to be erroneous. *Lehman Bros. v. McQueen*, 65 Ala. 570; *Rather v. Young*, 56 Ala. 94.

BRICKELL, C. J.—This is a bill for the specific performance of a contract, by which the appellant bound himself (to follow the words of the contract), “in consideration of having gave to my late daughter, Mary Bailey, certain moneys, part of which she returned to me, at or shortly after the time I purchased the farm on which I now reside,” to convey to the appellee, the husband of said Mary, certain lands, and agreed to give him “one-half my live stock and farm implements, reserving the mower, rake, huller, two-horse wagon and cart,” upon the following conditions as expressed in the writing: “he, the said Bailey, to pay off the mortgage for three thousand dollars that now stands against my property, and if judgment is obtained against me in a suit now pending, wherein Rowland & Co. are plaintiffs, he to pay one-half the amount; he to lift the mortgage within the present year, and I to make him a deed for the properties when he is prepared to lift the mortgage,” &c.

The material facts are, that in October, 1863, the appellant, then residing in the State of Illinois, conveyed to his daughter and only child, Mary, a tract of land there situate. The deed is an ordinary conveyance of bargain and sale, upon a recited consideration of seven thousand dollars. In April, 1864, the said Mary intermarried with the appellee, and thereafter she, with the appellant and appellee, resided in Illinois until the latter part of 1865, when a sale of said lands was made for ten thousand dollars, and the parties removed to Philadelphia. The proceeds of the sale of the lands were invested in United States bonds, which were placed in the exclusive possession of Mrs. Bailey, and which she and the appellee recognized and treated as her sole property, he not asserting any claim thereto. In February, 1866, the appellant purchased a tract of land situate in the county of Madison, in this State, of which the lands now in controversy form a part, for the sum of thirteen thousand dollars; of which, three thousand dollars was paid in

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cash; four thousand eight hundred and fifty dollars was paid March 1st, 1866, and the remainder, with interest, was payable two years thereafter. In making the two first payments, and in paying for the purchases of stock and farming utensils to be used in cultivating the lands, the appellant obtained from Mrs. Bailey the sum of sixty-seven hundred dollars, which she derived from a sale of the United States bonds. Soon thereafter Mrs. Bailey removed from Philadelphia; and from thence she and the appellee resided with the appellant on said lands, until her death in 1873. She died intestate, leaving surviving her an only child. In 1869, the appellant made final payment of the purchase-money of the lands, and received a conveyance, borrowing about three thousand dollars to make the payment, and executing a mortgage on the lands to secure the payment. There was with Mrs. Bailey and the appellee much dissatisfaction, because the conveyance of the lands was taken in the name of the appellant, and because there was no writing disclosing that she had an interest in the lands and other property, or that money of hers had been used in paying the purchase-money. The principal object of the contract now sought to be enforced, was the quieting and silencing all further controversy in reference to this matter. After having been notified by the appellant that he would refuse to carry the contract into execution, the appellee paid the mortgage debt referred to in the contract, and satisfaction of the mortgage was entered upon the record. The mortgage was then surrendered to the appellant, and received by him, because the mortgagee was unwilling to deliver it to any one else. The suit in favor of Rowland & Co. was pending and undetermined when the bill was filed, and at the hearing of the cause. The evidence as to the value of the property agreed to be conveyed, is conflicting, the witnesses differing in their estimates. The weight of the evidence shows, we think, that it was not of less value than six thousand dollars. The chancellor decreed a specific performance of the contract, and from the decree this appeal is taken.

The principles upon which a court of equity exercises its peculiar jurisdiction to enforce the specific performance of contracts are well known, and have been of frequent consideration and application in the past decisions of this court. The court will not intervene, unless the contract is fair, just, reasonable, and equal in all its terms and parts; is founded upon an adequate consideration, and its specific execution is free from hardship and oppression. If, on either of these points, there be a well founded objection, the court abstains from interference, leaving the party complaining of a violation of the contract to the remedies afforded him in courts of law. In the exercise of the jurisdiction, the court is invested with a discretion; not ar-

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bitrary or capricious, but a sound, judicial discretion, moulding and tempering its action, or the refusal to act, in view of the circumstances of the particular case, and from them determining whether the conscience of the party charged with a violation of the contract is so affected, that moral and equitable duty compel him to a strict performance, rather than to a payment of such damages as a court of law would award against him. A primary duty of the court is to examine the contract, not merely as a court of law would examine it, to ascertain what the parties have in terms expressed, but what in truth was the real intention of the parties, and to carry that intention into effect; or, if it can not be carried into effect, to leave the parties to their legal remedies.—*Hipwell v. Knight*, 1 Y. & C. Exch. 411. There is no class of cases, to which the jurisdiction of a court of equity extends, that the maxim “he who seeks equity must do equity,” is more rigidly applied. Hence it results, that the contract or agreement which the court is asked to enforce specifically must not only be certain, fair, just, reasonable, and equal in all its parts and terms, must not be merely voluntary, but founded upon a valuable and adequate consideration; and it must be mutual in its operation and effect. As is said by Prof. Pomeroy, “The contract must be of such a nature that both a right arises from its terms, in favor of either party against the other, while the corresponding obligation rests upon each towards the other; and also that either party is entitled to the equitable remedy of a specific execution of such obligation, against the other contracting party.”—Pomeroy on Contracts, § 162. Or, as is said in another work: “A contract, to be specifically enforced by the court, must be mutual—that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties, against the other of them. Whenever, therefore, whether from personal incapacity, the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending the execution in the former.”—Fry on Specific Performance, § 286. “I have no conception,” said Lord Redesdale, in *Lawrence v. Butler* (1 Sch. & Lef. 13), “that a court of equity will decree a specific performance, except when both parties had a right by the agreement to compel a specific performance, according to the advantage which might be supposed to have been derived from it.” Were it otherwise, a specific performance might be decreed, when, if it was disadvantageous to the party complaining, he could not, at the instance of the other party, be compelled to perform.

There are some cases, in which a want of mutuality in the
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contract, at the time it was entered into, is not regarded as an insuperable obstacle to specific performance; these rest upon their own peculiar circumstances and facts. Performance by the one party, and its acceptance by the other, may entitle the party performing to the assistance of the court, though he could not have been compelled to perform. The contract of an infant is voidable; but, after the arriving at age, he may affirm and enforce it, notwithstanding the original want of mutuality. The class of cases to which we refer are exceptions to the general principle, and involve considerations which justify the court in the specific performance of the contract. But, when the contract, in its nature and character, and according to the intention of the parties, involves and imposes a reciprocity of obligation and duty, there is no authority for enforcing specific performance of it, in favor of a party, who, on his part, has not performed, can not be compelled to perform, and is not capable of performing.—*Cooper v. Pena*, 21 Cal. 404. He has not done, and can not do equity, and is not in a situation to invoke the aid of the court. Applying this principle to the facts of this case, leads necessarily to the conclusion that specific performance of the contract can not be decreed.

The main inducement to the contract, the controlling purpose of the parties, was the settlement and adjustment of the rights accruing to Mrs. Bailey, because of the moneys of hers which had been employed in making payments for the lands, and for the stock and farming implements purchased to cultivate them; and to relieve the appellant from all corresponding liability. This is apparent from the words of the written agreement, when these are read in connection with all the facts and circumstances. The consideration it recites is certain moneys the appellant had given to his daughter, a part of which she returned to him, at or shortly after he purchased the lands. Upon this consideration, he agrees to convey the property on the performance of certain conditions by Bailey; and these conditions are the payment of the mortgage debt, and one-half of the judgment which might be obtained in the suit of Rowland & Co. There was no sale of the property intended, for the sums necessary to pay these demands, which were not a fair equivalent for the property; in no just sense did these sums constitute the price, or purchase-money of the property. The quieting and silencing all future and past controversy growing out of the use of the money of Mrs. Bailey, was the material element of consideration, and the real, controlling intention of the parties. It is not necessary to examine the evidence, proceeding largely from the immediate parties, embarrassed in irreconcilable conflict (which, it is hoped, results rather from an honest misunderstanding or misinterpretation of facts, than from intentional, deliberate misrepresenta-

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tion), and determine whether the moneys were loaned to the appellant, or contributed or advanced as a definite share of the purchase-money of the property, with the intention that in the property Mrs. Bailey should have a corresponding interest. If there was a loan, the purpose was its payment; or, if there was a trust created in, and attaching to the property, the purpose was its extinguishment; in the one aspect, acquitting and discharging the appellant from all personal liability; in the other, relieving the property he reserved from the operation of the trust. The tie or obligation of the contract, to which the appellant is subjected, is the conveyance of the property upon being discharged and acquitted of all personal liability for the loan; or, if it was not a loan, upon an extinguishment of the trust, if any was created, and upon the payment of the mortgage debt. The tie or obligation to which the appellee was subject, was the satisfaction of the loan, or the extinguishment of the trust, and the payment of the mortgage debt and one-half of the judgment Rowland & Co. might obtain. The tie or obligation was reciprocal, or the contract is wanting in mutuality, in fairness and justice; for no contract can be deemed fair and just, that is not reciprocal in its obligation and duties—that does not yield to each party the rights or benefits it is intended to confer.

If there were statutes in Illinois, or in Pennsylvania, when Mrs. Bailey and her husband were domiciled in those States, which operated a change of the common law as to the condition of the property of the wife, or of the marital rights of the husband, of them there is not in the record pleading or evidence. The presumption is, therefore, that the common law prevailed in each of those States. That presumption is indulged in reference to all sister States having a common origin with our own, until the contrary is shown by pleading and proof. The lands in Illinois not having been conveyed to the sole and separate use of Mrs. Bailey, by the marriage, at common law, the husband became seized thereof, entitling him to take the rents and profits during the joint lives of himself and wife, and by possibility during his own life, if he was the survivor. When, by sale, and by the conveyance of husband and wife, the lands were converted into money, if, without any particular agreement, the wife had permitted the money, which, in the language of *Sessions v. Sessions* (33 Ala. 522), was *new property*, to pass into the possession of the husband, the money, like any other personal property of the wife's when reduced to possession, would have become his property.—1 Bish. Mar. Women, § 605. But the money never passed into his possession; over it he claimed or exercised no control whatever. The evidence shows, very clearly, that intentionally Bailey abstained from exercising

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or claiming any dominion whatever over the money received from the sale of the lands, or of the United States bonds, in which it was subsequently invested; that he elected his wife should hold and treat it as her own. Not only was there by his conduct a renunciation of all ownership and dominion, and a recognition of the sole and exclusive ownership and dominion of the wife, but, according to his evidence, he gave to her United States bonds, of near the value of three thousand dollars, derived from a sale of his own personal property, made at the same time of the sale of the lands, and to the same purchaser.

While, at common law, the husband could, by a reduction to possession of the personal property of the wife, convert it into his own absolutely; or, if it was in the possession of the wife, her possession became, and was in contemplation of law, his possession; yet, he was not compelled to an assertion of his marital rights. The personal property of the wife, in her possession at the time of the marriage, or possession of which she subsequently acquired, he could refuse to take and hold; or, taking and holding it, he could elect to take and hold it as her trustee. Or, if the property was *choses* in action, he could refuse to exercise his marital right and power of making them his own, by a reduction of them to possession. In either of these events, the property remained unaltered—the property of the wife, passing to her personal representative.—*Jennings v. Blocker*, 25 Ala. 415; *Gillespie v. Burleson*, 23 Ala. 551; *Machen v. Machen*, 38 Ala. 364. Such was as necessarily and essentially the result, as if, after reducing the property to possession, converting it into his own, the husband had made a gift of it to the wife, which was construed as a gift to her sole and separate use.—*Williams v. Maull*, 20 Ala. 721; *McWilliams v. Ramsey*, 23 Ala. 816. Upon the United States bonds, and upon the money derived from their sale, by the law of the domicile of husband and wife, was impressed the separate ownership of the wife; and the ownership was unchanged by their subsequent removal to, and acquisition of a domicile in this State.—*Doss v. Campbell*, 19 Ala. 590; *Drake v. Glover*, 30 Ala. 382.

The wife having died intestate, if the money was loaned to the appellant, the exclusive right to recover or receive payment of it would pass to her personal representative. If there was a trust created in and to the lands, it would devolve by descent on her child, her only heir at law. The moneys being the separate estate of the wife, and not of her statutory separate estate, Bailey, as husband, had no interest in them; he was not a distributee of the personal estate of the wife, nor in any sense her heir at law. The obligation of the contract to which he is subject, he can not therefore perform; a decree compelling him to

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performance would compel him to do an act which he is without legal capacity to do. And if the appellant were compelled to performance, he would be deprived of the property for but little more than half of its real value, would not be freed from personal liability for the money, if it was a loan; or, if not a loan, and a trust was created, the trust would remain unextinguished, attaching to and encumbering the property he reserved. Under these circumstances, the court can but see that it would not really do that complete justice which it aims at, and which is the foundation of its jurisdiction to decree specific performance.—*Harnett v. Yielding*, 2 Sch. & Lef. 548.

“Ordinarily, when a bill is filed for specific performance, and it is dismissed, nothing more is settled by the decree, than that the case is one in which equity will not interpose its extraordinary powers. But there are cases in which the decree may deny a specific performance, and also give relief, or great injustice would be the consequence.”—*Mialhi v. Lassabe*, 4 Ala. 712. A case of this kind occurs, when the purchaser of lands has been let into possession, and has made valuable improvements. There may be well grounded objections to a decree of specific performance, and yet, in such case, his bill would be retained, and a decree rendered giving to him just compensation for the improvements. Or, he may have paid part of the purchase-money, and fail to make a case entitling him to specific performance; yet, if he has not a full and adequate remedy at law, the bill will be retained, and a decree rendered for the money paid.—*Aday v. Echols*, 18 Ala. 353. In this case, it is but just and equitable that the appellee should be subrogated to the security of the mortgage, which by payment he removed as an incumbrance upon the property. In a court of law, the subrogation would not be decreed; it is only in a court of equity it can be obtained.

The decree of the chancellor must be reversed, and a decree here rendered in conformity to this opinion.

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Bill in Equity for Settlement of Insolvent Estate.

1. *Decedent's estate; removal of settlement into equity.*—The settlement of a decedent's estate can not be removed into equity by the personal representative, in any case, or at any time, without the assignment of some particular ground of equitable jurisdiction; nor can it be removed at the instance of a distributee, or other party beneficially interested,

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after the jurisdiction of the Probate Court has attached and commenced to be exercised, unless some question of special equitable cognizance is involved, which the Probate Court is incompetent to determine.

2. *Insolvent estate; removal of settlement into equity.*—When a decedent's estate has been declared insolvent, it requires a very clear and strong case to justify the removal of the settlement into a court of equity.

3. *Same.*—The omission from the inventory of property which ought to have been included, the waste or conversion of assets, and the failure to make a settlement, being matters which are within the jurisdiction of the Probate Court, and as to which its powers are fully adequate to grant relief, furnish no ground for a resort to a court of equity by a creditor.

4. *Bill for discovery; necessary averments of.*—When a bill is filed for discovery and relief, seeking to withdraw from a court of law a matter of strict legal cognizance, it must show that the discovery sought is indispensable to the ends of justice—that the facts, as to which a discovery is sought, can not be proved otherwise than by the defendant's answer; and it must aver the existence and materiality of those facts with sufficient certainty, and show that the defendant is capable of making the discovery.

5. *Same; statutory provisions authorizing examination of parties as witnesses, in actions at law.*—The several statutory provisions, changing the common-law rules of evidence, and authorizing the examination of parties as witnesses in actions at law, do not take away, or in any manner affect, the established jurisdiction of courts of equity in matters of discovery.

6. *Dismissal of bill on demurrer; amendable defects.*—The dismissal of a bill in vacation, on account of defects which are amendable, without allowing the complainant an opportunity to amend, is an error which will work a reversal; but, when such dismissal is in term time, the record must show that he asked leave to amend.

APPEAL from the Chancery Court of Lawrence.

Heard before the Hon. THOMAS COBBS.

The bill in this case was filed on August 13th, 1878, by E. P. Shackelford, as the administrator of the estate of M. W. Mayes, deceased, and two other persons, claiming and suing as creditors of the insolvent estate of George M. Garth, deceased, against William S. Bankhead and his wife (Mrs. Catherine M., formerly the widow of said Garth), as the administrators of said insolvent estate, with the infant children and heirs at law of said Garth, and other creditors who had filed claims against his estate; and sought to remove the administration and settlement of said estate from the Probate Court, and to compel a discovery of assets and settlement of the estate in the said Chancery Court. According to the allegations of the bill, said Garth died, intestate, in April, 1862, in said county of Lawrence, where he resided; leaving a widow and two infant children, as his heirs at law and the distributees of his estate. Letters of administration on his estate were granted to the widow, and in August, 1868, she reported the estate insolvent; and it was so declared by the court, she being continued in office as administratrix. She afterwards married said William S. Bankhead, and they were acting as administrators of the estate when the bill was filed, "having never made any settlement of their

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administration of said insolvent estate, nor done anything towards the final settlement of said estate, and the distribution of the assets belonging thereto; nor has the said Catherine M. made any settlement of her administration of said estate before said declaration of insolvency." The bill alleged that the children of said intestate were in possession of the lands belonging to the estate, "taking and using the rents thereof as their own, with the connivance and approval of said Catherine M. and William S. Bankhead;" that said administrators had cultivated the lands for several years, had sold the crops, received the rents, and collected large sums of money due to the estate, for which they had never made any report or return; that the amounts so received and collected, which were assets of the estate, were unknown to the complainants, "nor have they the means of knowing or ascertaining;" and as to these matters they asked a discovery and account.

The chancellor dismissed the bill, on motion, in vacation, for want of equity; and his decree is now assigned as error.

PHELAN & WHEELER, for appellants.

CABANISS & WARD, *contra*. (No briefs on file.)

SOMERVILLE, J.—Where the jurisdiction of the Probate Court *has attached, and commenced to be exercised* in the settlement of the estate of a decedent, the Chancery Court will not, even on the application of a *distributee*, or other party beneficially interested, assume jurisdiction by removal of the administration into the forum of equity, unless it be shown that some question of special equitable cognizance is involved, which the Probate Court is incompetent to determine. Nor can such administration be removed into the Chancery Court, *in any case, or at any time*, by the *personal representative*, without the assignment of some particular ground of equitable jurisdiction. This rule may now be considered as firmly settled by the decisions of this court.—*Newsom v. Thornton*, 66 Ala. 311; *Maybury v. Grady*, 67 Ala. 147; *Whorton v. Moragne*, 59 Ala. 641; *Teague v. Corbitt*, 57 Ala. 529.

One of the most signal modes by which this active exercise of probate jurisdiction is manifested, is the declaration, by that court, of the *insolvency of the estate*. Where this has been done, it requires a clear and strong case to justify removal. As said in *Clark v. Eubank* (65 Ala. 245, 247), "When an estate is declared insolvent, there is an eminent fitness in having the settlement finished in the Probate Court, unless there is involved in it some question of exclusive equitable cognizance, which the Probate Court, by reason of its limited powers, is in-

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competent to adjudicate. Moreover, by the act of declaring an estate insolvent, the Probate Court acquires jurisdiction of the settlement, which precludes all interference by the Chancery Court, unless a special equity is shown."—*Moore v. Winston's Adm'r*, 66 Ala. 296; *Watts v. Gayle*, 20 Ala. 817. There is, in our opinion, no doubt whatever about the correctness of this principle.—*Prince v. Prince*, 47 Ala. 283; 1st Brick. Dig. 647, § 120.

It is obvious that the rule above announced must prove fatal to the general equity of the present bill, apart from the particular equity of *discovery*, to which we will hereafter advert. The summary of all the charges made against the defendants, as administrators of Garth's estate, is that they have omitted to make any settlement of the estate, and have converted to their own use, or otherwise become liable for a vast amount of personal assets, for the value of which they are legally chargeable; and that much of this property has been omitted from the inventory, where it should properly have appeared. No reason is assigned why these acts of mal-administration and of official *devastavit* can not be fully redressed by the Probate Court, whose powers are entirely adequate for the purpose.—*Clark v. Eubank*, 65 Ala. 245, *supra*; *Weakly v. Gurley*, 60 Ala. 379.

The bill is defective in its allegations as one framed for *discovery*, in aid of the relief prayed. Where a bill is filed, not for discovery alone, but also for relief, and seeks to withdraw from the jurisdiction of any law court a matter of strictly legal cognizance, it must be shown that the discovery sought is indispensable to the ends of justice—or, in other words, that the facts, as to which the discovery is sought, can not be otherwise proved than by the defendant's answer.—*Continental Life Ins. Co. v. Webb*, 54 Ala. 689, 697; *Horton v. Mosely*, 17 Ala. 794; 1 Brick. Dig. 714, § 1067. The bill must, also, aver the existence and materiality of such facts with sufficient certainty, and show that the defendant is capable of making the discovery. *Horton v. Mosely*, *supra*; Story's Eq. Pl. 325; *Lucas v. Bank of Darien*, 2 Stew. 280; *Guice v. Parker*, 46 Ala. 616.

It is quite clear, however, that this well established jurisdiction of equity in matters of discovery is not ousted, or in any wise affected, by the statutory changes in the common-law rules of evidence, by which parties to pending suits are authorized to be examined as witnesses in the courts of this State. *Cannon v. McNab*, 48 Ala. 99.

The bill, when tested by the above requirements, is defective. It fails to aver with sufficient certainty that the facts, as to which the discovery is sought, can not be proved in any other manner than by the answer of the defendants. The averment made as to some of these facts—that the complainants have no

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other "means of *knowing* them"—is insufficient; and others are of such a nature as that, presumptively at least, the transactions involving them may be within the cognizance of witnesses. If this be otherwise, the bill should clearly show it by affirmative allegations, free from all ambiguity of meaning.

These are amendable defects, however, and it was error for the chancellor to dismiss the bill *in vacation*, without first affording the complainants an opportunity to make the required amendments. This was so ruled in *Kingsbury v. Milner* (69 Ala. 502), a case which has been since several times followed. In *term time*, where the opportunity to amend is presented, the right must be claimed by the party entitled; and it has often been held that the chancellor can be put in error, only where the record shows a denial of this right, on application made in accordance with the rules of practice prevailing in a court of equity, and regulating amendments. A mere dismissal, without such denial, would be, in such cases, no ground for reversal in the appellate court.—*Little v. Snedcor*, 52 Ala. 167; *Bishop v. Wood*, 59 Ala. 253; *Brock v. S. & N. Ala. Railroad Co.*, 65 Ala. 79.

The decree of the chancellor must be reversed, and the cause remanded, in order that the bill may be amended, if it is so desired by the appellants.

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Bill in Equity for Specific Performance of Contract.

1. *Chancellor's opinion and decree differing.*—When the chancellor's written opinion, accompanying his decree, goes beyond the decree, an affirmance of his decree by this court is not an affirmance of the opinion; and a repugnancy between that opinion and his second decree, rendered after the affirmance, is not available as error on a second appeal.

2. *Rescission of contract, at instance of purchaser; lien for purchase-money paid.*—In rescinding a contract for the sale of lands, at the instance of the purchaser, the court may decree a lien on the land in his favor, for the purchase-money paid; but this lien is confined to such lands, or portions thereof, as the vendor had the legal right to convey.

3. *Same; conflicting claims of purchaser, and heirs of vendor for rent.* In such case, the land being the homestead exemption of the vendor and his family, which is not liable for his contract debts, the lien in favor of the purchaser is properly declared to be subordinate to the claim of the vendor's heirs for the rents while the purchaser was in possession under the contract. (BRICKELL, C. J., dissenting.)

4. *Attorney's lien.*—The lien of an attorney at law, for his stipulated or reasonable fee, is limited to the judgment recovered in the particular case in which his services were rendered; and it does not extend to

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lands, or other like property of the client, which is the subject-matter of the litigation.

APPEAL from the Chancery Court of Colbert.

Heard before the Hon. THOMAS COBBS.

This case was before this court at its December term, 1880, and is reported, under the name of *Jenkins v. Harrison*, in 66 Ala. 345-361. The bill was filed on the 29th March, 1876, by John B. Harrison, against John S. Jenkins and others, children and heirs at law of Thomas B. Jenkins, deceased; and sought the specific performance of a contract entered into between the complainant and said decedent, for a sale or exchange of lands, as shown by the written agreement, signed by both of them, which is set out in the former report of the case; or, in the alternative, a rescission of the contract, the cancellation of a deed executed by the complainant for the property which, by the terms of the contract, he was to convey to the said Jenkins, and the declaration of a lien on the defendants' land for the money paid and advanced by the complainant under the contract. On the first hearing of the case, the chancellor (Hon. H. C. SPEAKE) refused a specific performance, but rendered a decree rescinding the contract; and his decree was affirmed by this court, on appeal by the defendants, as shown by the former report of the case.

The decree from which that appeal was taken was in these words: "It appearing to the satisfaction of the court that the complainant is entitled to relief, it is therefore ordered, adjudged, and decreed, that the respondents be, and they are each, forever enjoined and restrained from the further prosecution of the judgment by them recovered against the complainant, John Harrison, in the Circuit Court of Colbert county, described in the pleadings in the cause. It is further ordered, adjudged, and decreed, that the contract entered into by and between the said John Harrison and Thomas B. Jenkins, on April 3d, 1871, be, and the same is hereby, rescinded; and that said contract and the deed executed by John Harrison and wife to Thomas B. Jenkins, and the one executed by Thomas B. Jenkins and wife to John Harrison, each of date April 13, 1871, be, and they are hereby, each declared null and void, and of no effect. It is further ordered, adjudged and decreed, that all title in and to the house and lot in South Florence, known in the plan of said town as No. 39, be, and the same is hereby, divested out of the respondents, and invested in the said John Harrison. It is further ordered, adjudged, and decreed, that the respondents, by the next term of this court, select of the lands described in the bill," a tract containing 240 acres, "eighty acres thereof, upon which is situated the dwelling and appurtenances

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thereunto belonging that was occupied by said Thomas B. Jenkins at the time of his death; and after such selection, it is further ordered, adjudged, and decreed, that the register ascertain how much is the yearly rental value of said eighty acres, from the time said Harrison obtained the possession thereof, and that he also ascertain the yearly rental value of the remaining one hundred and sixty acres of said tract; also, that he ascertain the yearly rental value of said house and lot in South Florence (No. 39), from the time said Thomas B. Jenkins and respondents obtained possession thereof. It is further ordered, adjudged, and decreed, that the register ascertain how much the said Harrison paid for the said land attempted to be sold to him by the said Jenkins, either to the said Jenkins himself, or to his personal representative since his death, embracing the value of the stock of dry-goods, &c., the cash paid, and the amount said Jenkins was due and owing Harrison at the time of the death of said Jenkins, and for which Harrison has given his estate credit; deducting from said sums the amount of one thousand dollars, the value fixed by the parties upon the said store-house and lot in South Florence, and calculating interest thereon to the time of making his report, and also on each of the rental values ordered to be ascertained. . . . All other questions are reserved until the coming in of said report."

In his opinion accompanying this decree, after declaring that the complainant was not entitled to a specific performance, the chancellor said: "I think this a proper case for the rescission of the entire contract, and placing the parties, as nearly as possible, *in statu quo*. To do this, it would be proper that the deed executed by Harrison to Jenkins should be delivered up and cancelled; Jenkins to account for the rents of the lot and store-house thereby conveyed; the respondents to select the eighty acres, including the dwelling and appurtenances thereon situated, which is exempted by the constitution as a homestead; also, to refer it to the register to ascertain the amount, with interest, paid by Harrison to Jenkins, or to his administrators, embracing the goods, cash, and indebtedness of Jenkins to Harrison at the time of his death, deducting from the original sum \$1,000, the agreed value of the house and lot in South Florence; also, to ascertain the value of the rents of the lands selected as exempt, and the value of the rents of the remaining lands; to deduct the rents thus ascertained, from the whole amount paid by Harrison, and condemn the 160 acres of land not exempted, for the satisfaction thereof; that Harrison pay the rent ascertained to be due for the homestead exemption, less the rent of the house and lot in South Florence; also, to enjoin the judgment rendered in the Circuit Court, and, if the

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administrator *de bonis non* was a party defendant, to enjoin the further prosecution of the suit upon the note."

The complainant having died pending the appeal in this court, the suit was revived in favor of John A. McWilliams, the present appellant, as his administrator; and said administrator filed an amended bill, after the remandment of the cause, alleging that his intestate's estate had been reported and declared insolvent. The register afterwards executed the order of reference made in the first decree, and no exceptions being reserved to his report, it was confirmed by the court on the 11th October, 1882; and on the same day a decree was rendered, which, after referring to the affirmance by this court of the former decree, proceeded thus:

"And in order to adjust the equities in said cause, in accordance with the principles established in said decree, the court now proceeds to render a decree. (1.) It appears from the report of the register, read and confirmed, that the rental value of the eighty acres of land, with interest, amounts to the sum of \$3,192.80, and the rental value of the house and lot in South Florence to \$1,192; which, when deducted, leaves the sum of \$2,000 due to Annie A." and the other children of Thomas B. Jenkins, "from the estate of said John Harrison. (2.) It appears from said report, also, that said Harrison paid to said Jenkins in his life-time, and to his personal representatives, the sum of \$5,373.78; from which deducting value of house and lot (\$1,000), and adding interest for eleven years and six months (\$4,023.87), makes the amount of \$8,397.65; from which deducting the rental value of the 160 acres of land, with interest, amounting to \$3,456.81, leaves amount due from estate of Jenkins to estate of Harrison, \$4,940.85. (3.) It is ordered, adjudged, and decreed, that said complainant, as the administrator of the estate of said Harrison, recover of R. B. Lindsay, as the administrator of the estate of Thomas B. Jenkins, deceased, the said sum of \$4,940.85, subject to be credited by the proceeds of the sale of the 160 acres of land, as hereinafter directed; and it appearing that the estate of said Jenkins has been declared insolvent, no execution will issue, but the claim must be certified by the register to the Probate Court. (4.) It is ordered, adjudged, and decreed, that the following lands," particularly describing the 160 acres, "are condemned for the satisfaction of the complainant's demand, less the amount, hereinafter specified, in favor of the heirs of said Jenkins, and the costs of this suit. (5.) It is ordered, adjudged, and decreed, that the register proceed to sell the said lands above described," specifying the terms, &c.; "and out of the proceeds he will first retain the costs and expenses of sale, and the sum of \$2,000, with interest on the same from the date of this decree, to meet

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the further order of this court in regard to the application of the same to" the infant children of Jenkins, "and apply the residue to the credit of complainant's claim; and the register will make conveyance to the purchaser. (6.) It being made further to appear that the estate of said Harrison is insolvent, it is ordered, adjudged, and decreed, that the claim of the heirs of said Jenkins," naming them, "be certified by the register of this court to the Probate Court, to be filed against said estate, subject to be credited by the proceeds of the sale of the lands above directed. (7.) It further appearing that the homestead has been selected, as by the former decree of this court," describing the lands, "it is therefore ordered and decreed, that the administrator of the estate of said Harrison deliver possession of the same to the party or parties authorized to receive it. (8.) All other questions not determined are reserved until the coming in of the register's report of sale."

Pending the cause after the remandment, the complainant's solicitors filed a petition, asking a reference to the register to ascertain and report what would be a reasonable fee for their services in the cause, and that it be declared a lien on the land ordered to be sold. The reference was ordered, and executed; but the record does not show any action by the chancellor on the register's report.

The appeal is sued out by Harrison's administrator, and he here makes seven assignments of error, all founded on the decree above copied. The assignments of error are, in substance, that the decree is inconsistent with the former decree which was affirmed; that the complainant's lien on the land was superior to the right or equity of the heirs of Jenkins, and should have been so declared; that the claim of the heirs should have been certified to the Probate Court; and that a lien on the land, or its proceeds, should have been declared in favor of complainant's solicitors.

WM. COOPER, and THOS. H. WATTS, for appellant.—(1.) By the former decree, which was affirmed by this court, the proceeds of sale of the 160 acres of land was condemned to the satisfaction of the debt due to Harrison's estate, and was ordered to be applied first to the satisfaction of that claim; while the last decree, from which this appeal is taken, makes that fund first chargeable with the \$2,000 found due to the defendants for rent. These matters are *res adjudicata*, and the latter decree is erroneous so far as it departs from the former.—*Wyatt v. Steele*, 26 Ala. 647; *Miller v. Jones*, 29 Ala. 174; *Bryant v. Boothe*, 35 Ala. 269; *Meredith v. Naish*, 4 Stew. & P. 59; *Thomas v. Dill*, 34 Ala. 175. (2.) The estate of Harrison having been declared insolvent, the claim for \$2,000 on account

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of rent should have been certified to the Probate Court, and paid *pro rata* with other claims against the estate. When an estate is declared insolvent, the decree invests the Probate Court with exclusive jurisdiction of all claims against the estate, including pending suits.—*Ray v. Thompson*, 43 Ala. 451; *Edwards v. Gibbs*, 11 Ala. 294; *McEachin v. Reid*, 40 Ala. 411; *McGehee v. Lomax*, 49 Ala. 131. (3.) The complainant's solicitors have a lien on the fund recovered in this case, for their professional services rendered; and the court should have so decreed.—*Jackson v. C'lopton*, 66 Ala. 29; *Warfield v. Campbell*, 38 Ala. 527; *Ex parte Lehman, Durr & Co.*, 59 Ala. 631. (4.) The correctness of the former decree, giving the complainant a lien on the land for the purchase-money paid, can not be questioned.—*Aday v. Echols*, 18 Ala. 353; *Gressett v. Foster*, 29 Ala. 393; Fry on Specific Performance, § 939; *Griffith v. Depero*, 3 Mar. Ky. 177. This lien is entirely destroyed by the last decree, giving a prior lien to the heirs of Jenkins for an amount which will absorb the fund.

J. B. MOORE, *contra*.—(1.) There is no real discrepancy between the first and the last decrees; indeed, the first could be carried into effect in no other way than was done. The homestead was never subject to the complainant's demand, nor to any other debts which Jenkins owed; and the rents accruing to his children, while the homestead was in the possession of Harrison, can not be applied to the payment of their ancestor's debt. (2.) This equity of the children accrued before the estate of Harrison was declared insolvent, and their lien can not be destroyed or affected by the declaration of insolvency. (3.) The question of the attorney's lien is not presented to this court, since it was not acted on by the chancellor.—22 Ala. 106; 28 Ala. 569; 20 Ala. 392; 18 Ala. 482. If the question were presented, it is submitted that no lien on the land is shown, under the authorities cited for the appellant.

SOMERVILLE, J.—The bill was originally one for specific performance, brought by the intestate, Harrison, against the appellees, as heirs of one Jenkins, to compel the conveyance of certain lands. The proof in the cause showing a failure of title to a portion of the land, constituting *the homestead* of the decedent and his family, which was attributable to an incurable defect in the instrument purporting to alienate it, the chancellor rescinded the contract of conveyance, and made a decree on September 17, 1877, the ultimate purpose of which was to put the parties, or their privies in estate, *in statu quo*, as far as was practicable under the circumstances. This decree was affirmed,

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on appeal taken to this court, at the December term, 1880. *Jenkins v. Harrison*, 66 Ala. 345.

The decree here appealed from was rendered October 11, 1882. The first decree did not go further than to declare a cancellation or rescission of the contract of sale, and to refer to the register the ascertainment of certain amounts and valuations, a knowledge of which was necessary in definitely fixing the mutual rights of the litigants. The decision of all other questions was expressly reserved until the coming in of the register's report. It is noticeable, that the *opinion* of the chancellor, accompanying the first decree, went much further than the *decree* itself, which is a separate and distinct paper. But this fact is obviously immaterial, as it was *the decree, and not the opinion* of the chancellor, which this court affirmed on the last appeal. Attention is called to this feature of the case, because it is insisted in argument that this supposed repugnancy now affects the merits of the present decree. It is enough to say, that we see no conflict in the two decrees, whatever may be said of the first opinion by a former chancellor.

It is not denied, by either party, that upon the rescission of the contract in question, the court possessed the power, as was also its duty, to secure the purchase-money paid by the vendee, Harrison, by giving a lien, or creating a charge on the land, for its re-payment. This right to protect vendees, by thus securing them in the reimbursement of their purchase-money, advanced upon the faith of the contract, is well established in our system of equity procedure, and constantly invoked in the every-day practice of the courts.—*Aday v. Echols*, 18 Ala. 353; Fry on Specif. Perf. § 939; Sugden on Vendors, 62–63. This lien is properly confined, however, to such lands as the vendor has the lawful right to convey.

The point of contention in this case is, that while the chancellor declared such a lien in favor of the appellant, as the personal representative of Harrison, it was made subordinate to a prior lien given to the heirs of Jenkins, for the rents of the homestead property, which were virtually collected by Harrison, and appropriated to his use, while he was in possession of the land, claiming it as purchaser under the original contract of sale, proved to have been made by Jenkins. We are of opinion that the views of the chancellor were correct. These rents, amounting to the sum of two thousand dollars, as is shown by the report of the register, were the moneys of the defendants. They had accrued from the use and occupation of the homestead, to which Harrison had no title, or lawful claim of any kind. They were appropriated by him in the payment of his claim against the estate of the vendor, Jenkins, and thus went in exonera-

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tion of the hundred and sixty acres of land, upon which the charge or lien is declared. The land was thus relieved, *pro tanto*, of an incumbrance upon it. The chancellor merely decrees that the heirs of Jenkins, whose money went to pay this charge, shall be subrogated to Harrison's lien for their reimbursement. The payment of the incumbrance was thus adjudged to be rather a purchase than an extinguishment, which is the very essence of every similar subrogation. This equity does not originate in contract, or agreement between the parties; but it is the mere creature of equity, based on principles of justice, and designed to prevent its failure. It is nothing more than the putting by transfer one person in the place of another, and investing the former, in promotion of fair dealing, with the equitable rights of the latter.—Sheldon on Subrogation, §§ 1, 11, 62, 206, 209, 212–13.

There is no force in the suggestion, that this view operates to give mere *donees* a precedence over a *creditor* of the decedent. If the heirs of Jenkins had inherited property liable to be charged with the debts of the decedent, the argument might be sound. But the land, from which the rents in question accrued, was a *homestead*, which was exempted from liability to legal process for the payment of the decedent's contract debts of any character. The conveyance of such property by a husband to a member of his own family, even though voluntary, has been held not to be fraudulent.—*Lehman v. Bryan*, 67 Ala. 558; *Fellows v. Lewis*, 65 Ala. 343. The reason is, that the creditors have no right to pursue exempted property for the satisfaction of their claims, and hence their legal rights can not be prejudiced by a conveyance of it.—*Shirley v. Teal*, 67 Ala. 449; *Thomp. on Homesteads*, §§ 411–12; *Bump on Fraud. Conv.* 268. This reason becomes still more forcible, when there is a devolution of title effected by operation of law, instead of by act of the owner, made manifest by a voluntary conveyance.

The *lien*, which an attorney at law has for his stipulated or reasonable fees, is limited to the judgment recovered in the particular cause in which the professional services were rendered. He is regarded as an assignee of the judgment or decree, *pro tanto*—to the extent of his fee—from the date of its rendition. It is consequently subordinate to all counterclaims, or sets-off, existing at the time, including, of necessity, such as are allowed prior to the rendition of the judgment.—*Jackson v. Clopton*, 66 Ala. 29; *Ex parte Lehman, Durr & Co.*, 59 Ala. 631; *Warfield v. Campbell*, 38 Ala. 527. It does not extend to the lands, or other like property, which is the subject-matter of litigation belonging to the client.—*Hinson v. Gamble*, 65 Ala. 605. The solicitors of the appellant would be entitled to no lien, extending beyond the amount of the decree

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obtained for their client. Their rights are gnaged by, and must be commensurate with his.

The decree of the chancellor is affirmed.

BRICKELL, C. J., dissenting.

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Contest of Claim of Exempt Personal Property.

1. *Claim of exempt personal property; how contested.*—When a declaration and claim of exemption in and to specific articles of personal property has been filed in the office of the judge of probate of the county, a levy can not lawfully be made upon the property (Code, § 2830), unless the plaintiff in the process first makes affidavit and gives bond as prescribed by the statute; and if a levy is made without the performance of these conditions precedent, it will be set aside on motion.

2. *Same.*—If a bond is not given before or at the time of the levy, it can not be subsequently supplied on the hearing of a motion to set aside the levy; and a bond of indemnity, given to the sheriff for his own protection in making the levy, is not a compliance with the statute.

3. *Revision of judgment on facts.*—When a question of fact, arising on the hearing of a motion, is necessarily submitted to the decision of the court without the intervention of a jury, the decision will not be reversed by this court on appeal, unless it is clearly erroneous.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. H. C. SPEAKE.

This was a motion to set aside the levy of an attachment on certain personal property, described in the levy as "one bay mare, about five or six years old, and one spring wagon." The attachment was in favor of W. W. Totten & Brother, against M. S. Sale & Co.; and the levy was made on December 10th, 1881. The motion to set aside the levy was made by M. S. Sale individually, the grounds on which it was made being thus stated: "1st, because the attachment was not issued and said levy made according to law; 2d, because said levy was made upon personal property of said defendant, which had been previously claimed as exempt by him under the constitution and laws of Alabama, by sworn declaration of exemption filed in the office of the Probate Court of said county, as required by section 2828 of the Code, before plaintiffs had made affidavit and bond as required by section 2830 of the Code." On the hearing of the motion, as the bill of exceptions shows, the defendant introduced in evidence his declaration and claim of exemption, which was filed in the office of the probate judge, duly verified

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by affidavit, on the 9th December, 1881; and in which the property afterwards levied on was particularly specified. The plaintiffs then introduced "the affidavit and bond for attachment, the forthcoming bond, and the affidavit contesting said claim of exemption." The affidavit contesting the claim of exemption, as copied in the bill of exceptions, is marked "Filed August 16th, 1882;" while the forthcoming bond, which recites that "said claim of exemption has been contested by said plaintiffs," is dated December 16th, 1881. The plaintiffs introduced in evidence, also, as the bill of exceptions then recites, "the other papers in said cause"—namely, the summons and complaint, issued December 10th, 1881; the defendant's pleas in abatement, which were overruled, and pleas in bar then filed; an affidavit and claim of exemption, sworn to and filed on 6th February, 1882; an affidavit by plaintiffs' attorney, made and subscribed on the 10th December, 1881, contesting the claim of exemption filed on the 9th December, 1881; and an indemnifying bond given to the sheriff, dated December 10th, 1881. The indemnifying bond recites the levy of the attachment, the claim of exemption made and filed on the 9th December, the contest of this claim by the plaintiffs, and their direction to the sheriff to make the levy; and is conditioned to save the sheriff harmless on account of the levy. The sheriff's legal adviser, who was examined as a witness for the defendant, testified that the affidavit contesting the claim of exemption was made after the giving of the indemnifying bond; while the sheriff testified, "that said indemnifying bond was, according to his recollection, given to him before the making of the affidavit contesting the claim of exemption, and was required by him before he would retain the property, which was already held by him under a prior levy in favor of O. R. Hundley; and that he refused to retain the property, unless such affidavit and bond was made and lodged with him." The plaintiffs' attorney then testified, that when he went to the sheriff's office with the attachment papers, and there ascertained that there was a prior levy in favor of Hundley, "while the effect of said prior levy was being discussed, a note was received from Hundley releasing his levy, and ordering the restoration of the property to said defendant; that he thereupon immediately directed the sheriff to levy the attachment in favor of plaintiffs; and that, according to his best recollection, the affidavit of contest was made and lodged with the sheriff, and said indemnifying bond was given, after said levy was made by the sheriff." The plaintiffs then offered, before the court decided the motion, "to make and execute any bond that the court might require or allow;" but the court refused to allow any bond to be then given, and sus-

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tained the motion to set aside the levy. The plaintiffs excepted to each of these rulings, and now assign them as error.

HUMES, GORDON & SHEFFEY, for appellants.

D. D. SHELBY, and O. R. HUNDLEY, *contra*.

BRICKELL, C. J.—Upon personal property claimed as exempt from levy and sale for the payment of debts, if a declaration and claim of exemption has been filed in the office of the judge of probate of the county in which it is situate, a levy can not be made, unless the plaintiff in the process proposed to be levied, make affidavit, and give bond, as prescribed by the statute.—Code of 1876, § 2830. The making of the affidavit, and giving the bond, are conditions precedent to a valid, lawful levy. A levy made without observing them is invalid and illegal, and may, on motion, be set aside by the court. There is some conflict in the evidence, whether the affidavit contesting the claim of exemption was not made and filed before, or contemporaneously with the levy. If the Circuit Court determined that the affidavit was not made and filed until after the levy, unless, on this question of fact, the decision was manifestly wrong, the judgment could not be reversed. When questions of fact are necessarily submitted to the decision of a primary court, without the intervention of a jury, the decision will not on error be reversed, unless clearly erroneous.—*Dane v. Mayor*, 36 Ala. 304. However that fact may be, it is undisputed, that the plaintiffs did not make a bond payable to the defendant, claiming the exemption, as required by the statute, before or at the time of the levy. The only bond executed, was a bond payable to the sheriff, exacted by him for his own protection and immunity, which was not intended to serve, and can not be made to serve, the purposes of the bond required by the statute. The bond not having been given before, or at the time of the levy, could not be given subsequently, on the hearing of a motion to set aside the levy.

Affirmed.

[Binford's Adm'r v. Dement.]

Binford's Adm'r v. Dement.*Bill in Equity to enforce Vendor's Lien on Land.*

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1. *Competency of party as witness, to prove transactions with decedent.* Under a bill to enforce an alleged lien on land, filed by the personal representative of the deceased vendor, the defendant is incompetent to testify in his own behalf, as to any transactions between himself and the decedent (Code, § 3058), unless called to testify by the complainant.

2. *Objections to evidence; when and how made.*—When interrogatories propounded to a party, as a witness in his own behalf, call for illegal evidence, objection should be taken before filing cross-interrogatories; but this rule does not prevail, when the illegality of the evidence is unknown, or is only disclosed by the answers.

3. *Same.*—Objecting to interrogatories which call for illegal evidence, without more, is not sufficient to bring before the chancellor the question of the admissibility of the evidence: there must be, also, written exceptions signed by counsel, specifying the portions of the testimony sought to be suppressed.

4. *Same.*—Motions to suppress testimony, founded on exceptions duly filed, are properly heard before entering on the trial; or, by consent, they may be heard and determined in connection with the main cause; but, when the parties proceed to a hearing by agreement, stipulating that the chancellor may disallow all illegal evidence, this "rather loose practice has a tendency to cast on the chancellor so much unnecessary labor, that he may very justly refuse to act on such agreement."

5. *Same.*—Objections to evidence can not be raised for the first time in this court, but are waived when not properly taken before the chancellor.

APPEAL from the Chancery Court of Madison.
 Heard before the Hon. N. S. GRAHAM.

D. P. LEWIS, for appellant.

BRANDON & JONES, *contra*.

STONE, J.—The present bill was filed to enforce an alleged vendor's lien. The sale to Dement was made in 1869, and a conveyance made by T. T. Binford, who then held the legal title. The deed contains the usual recital of purchase-money paid. This suit was brought in 1879,—more than ten years after the purchase. No written promise to pay the purchase-money is produced, and it is shown that none was ever given. T. T. Binford, the grantor in the conveyance, died about 1875, and this suit was brought by his administrator. The chief, if not the only legal testimony, if properly excepted to, that any

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portion of the purchase-money was left unpaid, is found in the answer of defendant.

Defendant, Dement, had his own testimony taken in his own behalf. Many objections were filed to the interrogatories, and to answers to be elicited thereby; which objections preceded the filing of cross-interrogatories to this witness. The main point of the objections is, that the said interrogatories sought to prove by this witness transactions with, and statements by complainant's intestate.—Code of 1876, § 3058. There can be no question, that the defendant was incompetent to testify for himself on this question, unless called to testify by the opposite party.—*Dudley v. Steele*, 71 Ala. 423.

To raise this question, brought to view as it was by the interrogatories themselves, it was necessary that the objections should be taken before proceeding to file cross-interrogatories. Failing to do so, would have been a waiver of all objection to the testimony, on that known ground. The rule is different, when the ground of incompetency is unknown, or only disclosed by the answers of the witness. Exception can then be taken, even after publication.—3 Greenl. Ev. §§ 349 to 352.

It is not enough, however, that objections be taken to the interrogatories. Such objections do not bring the question before the chancellor, nor call for his ruling upon them. They are the predicate—a necessary predicate—for exceptions to be afterwards filed, but are not exceptions to be ruled on. Such exceptions are in writing, signed by counsel; specify the portions of the testimony sought to be suppressed, and become a part of the file. And if the ruling on them, or a failure to rule on them, is sought to be reviewed in this court, they are a necessary part of the transcript. In this way we are informed that the chancellor's attention is called to them, and that they were insisted on in the court below.—*Eldridge v. Turner*, 11 Ala. 1049; *Jordan v. Jordan*, 17 Ala. 466; *Walker v. Smith*, 28 Ala. 569.

Motions to suppress, founded on exceptions thus filed, are properly heard before entering upon the trial.—*Beattie v. Abercrombie*, 18 Ala. 9. By consent, however, they may be, and frequently are heard and determined in connection with the main cause. So, we have knowledge that, in a generous, if not loose practice, parties, by agreement, sometimes proceed to trial, stipulating that the chancellor may disallow all illegal evidence. The first named of these practical departures we have not considered it our duty to condemn. The last has a tendency to cast on the chancellor so much unnecessary labor, that we think he might very justly refuse to act on such agreement.

In the present record, we find no exceptions filed to any part of the testimony. The chancellor in his decree says: "There

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is no motion to suppress any portion of the testimony. Objections to interrogatories, without more, are not sufficient, nor the equivalent of objections to testimony, or a motion to suppress testimony." This is certainly true, and the result is, that no valid objection was made in the court below to any testimony found in this record. Such question can not be raised in this court for the first time.

The chancellor dismissed complainant's bill, and decreed for defendant. The defendant, in his own testimony, affirms most positively that he paid all the purchase-money,—making the last payment in 1871. His vendor lived four years afterwards, and there is testimony tending to show he was in straitened circumstances. No writing was taken evidencing the debt, and the purchaser was left quietly in possession for ten years, before this suit was brought. We do not find enough in this record to show clearly that the chancellor erred.—*Nooe's Executor v. Garner's Adm'r*, 70 Ala. 443.

Affirmed.

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Contest of Claim to Homestead Exemption.

1. *Surety's rights, as against fraudulent and voluntary conveyances.*—A surety is a creditor, within the meaning of the statute of frauds (Code, § 2124), and entitled to protection against fraudulent and voluntary conveyances, from the time when his contingent liability was assumed, although he has no technical right of action until he has paid the debt.

2. *Exemptions; determined by what law.*—As against creditors, the right to a homestead or other exemption, its value and extent, must be determined by the law which was of force when the debt was contracted; and when the creditor is a surety, by the law which was of force when his liability was assumed.

3. *Same; renewal of debt, or change of parties.*—The mere renewal of a debt, or the novation of an old debt by a new one, does not affect the debtor's right of exemption; but, when a new liability is created, by reason of change of parties, or otherwise, and it is taken in full payment and discharge of the original debt, the right of exemption is measured by the law in force at the date of the new obligation.

4. *When note or bill operates as payment.*—The giving by a debtor of his own bill or note, though negotiable, does not operate to discharge the debt, unless it is accepted as an absolute payment; but, while it is regarded, *prima facie*, as only collateral or additional security, all the authorities concur that, by express agreement, it may be regarded as a satisfaction and a bar.

5. *Same.*—The English cases require an express agreement, unless the bills received have been negotiated, and are outstanding against the defendant; but the modern American authorities, viewing it as a ques-

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tion of intention, hold that an implied agreement, to be determined by the jury from a consideration of all the facts, may have the same effect; and this is adopted by this court as the correct rule.

6. *Lien of execution; how affected by delay or suspension.*—As against the defendant in execution, his heirs, or personal representatives, the lien of an execution is not lost or suspended by the plaintiff's direction to the sheriff to hold it up, since they can not be thereby prejudiced.

7. *Contest of claim of homestead exemption; where originated and tried.* When an execution, issued on a judgment in the Circuit Court, is received by the sheriff during the life of the defendant, but is not levied until after his death (Code, § 3213), and a homestead is thereupon claimed by the widow; the execution and claim are properly returned into the Circuit Court, where a contest of the claim may be originated and tried; and it is not proper that the contest should be originated in the Probate Court, and certified to the Circuit Court for trial.

8. *Sale of lands under execution, after defendant's death.*—When an execution is received by the sheriff during the life of the defendant, and its lien is preserved as authorized by the statute (Code, §§ 3213, 2633), lands may be sold under a levy made after his death, as if he were still alive.

9. *Claim of homestead exemption by widow; proceedings under.*—When a homestead exemption is claimed by the widow in lands on which an execution, received by the sheriff during the life of the defendant, is levied after his death, the proceedings for its allotment should be governed by section 2832 of the Code, and not by section 2841.

10. *Proof of transactions with decedent; who may testify as to.*—When a homestead exemption is claimed by the widow and infant children of the deceased defendant in execution, and their claim is contested by the plaintiff, a surety who is bound for the debt on which the judgment is founded, though not a party to the contest, is incompetent to testify to any transactions between the plaintiff and the deceased defendant (Code, § 3058), since he is beneficially interested in the result.

APPEAL from the Circuit Court of Jackson.

Tried before the Hon. H. C. SPEAKE.

This was a contest as to the right to a homestead exemption in lands, between William R. Larkin, plaintiff in execution against Lemuel G. Mead, deceased, and Mrs. Mary F. Mead, his widow (now the wife of C. C. Keel), and her two infant children, as claimants. The case was before this court, on a former appeal, at its December term, 1880, when the judgment of the Circuit Court was reversed, and the cause was remanded. *Mead v. Larkin*, 66 Ala. 87. The tract of land claimed contained about one hundred and forty acres, and its value was proved to be from \$1,200 to \$1,500; and it was part of a larger tract, containing about four hundred acres, on which the said Lemuel G. Mead resided at the time of his death, which occurred on the 14th January, 1878. The plaintiff's judgment against said Mead, on which was issued the execution levied on the lands, was rendered on the 26th October, 1876. An execution on this judgment was issued on the 3d November, 1877, and levied on the entire tract of land; and this execution was returned by the sheriff, on the 19th December, 1877, "Ordered held up by plaintiff." Another execution was issued on the

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27th April, 1878, and returned on the 12th June, "No property found." A third execution was issued on the 16th October, 1878, and a fourth on the 3d January, 1879, each of which was returned "No property found." An *alias pluries* was issued on the 26th March, 1879, and was levied on the entire tract of land; and at a sale under this levy, on the 9th May, 1879, made subject to the right of homestead exemption, the plaintiff himself became the purchaser, at the price of \$200. The widow's claim of exemption, in behalf of herself and her infant children, was filed in the office of the probate judge, duly verified by affidavit, on the 31st May, 1879; and the plaintiff's affidavit contesting the claim was filed in the Circuit Court, on the 2d June, 1879.

The claimant filed a plea to the jurisdiction of the court, "because no contest of her claim was made in the Probate Court of said county, which has jurisdiction of the estate of said decedent; and this court only has jurisdiction to try the widow's claim of homestead, when the issues are made up in the Probate Court under section 2841 of the Code." In support of this plea, issue being joined on it, the claimant introduced in evidence her original claim of exemption filed on the 31st May, 1879, and the records of the said Probate Court showing that the estate of said Lemuel G. Mead was regularly declared insolvent by said Probate Court on the 25th November, 1881; that she thereupon filed her claim to the lands as a homestead exemption, in said Probate Court, on the 26th May, 1882; that notice thereof was given to the administrator, and the claim was still pending and undecided in that court. The court overruled and disallowed the plea, and issue was then joined on the grounds of contest.

The plaintiff's judgment was founded on two bonds, or promissory notes under seal, executed by said Lemuel G. Mead and one Samuel H. Lewis as joint obligors, dated December 4th, 1874, and payable one and two years after date respectively, to the plaintiff or order, with interest. Lewis signed the notes, or bonds, as the surety of Mead, and the action was brought against both of them; but, Lewis not being served with process, the action was discontinued as to him, and judgment taken against Mead alone. A separate action was afterwards brought, and judgment recovered against Lewis. The plaintiff contended that the claim of exemption was excessive in quantity and value; that the right of exemption, its value and extent, was governed by the statute which was of force in December, 1860, when the original debt was contracted which formed the consideration of said notes or bonds. In this connection, plaintiff proved that, on the 4th December, 1860, said Lemuel G. Mead executed his promissory note for \$4,230, with plaintiff and several others as his sureties,

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payable to the executors of the last will and testament of Samuel Townsend, deceased; that on the 27th October, 1870, the surviving executor recovered a judgment on this note, against said Mead, Larkin (plaintiff), and another one of the sureties; that on the 20th February, 1871, plaintiff paid one-half of this judgment, which then amounted to \$3,885.40, the other half being paid by the other surety; that on the 4th December, 1874, "there was a settlement between said Mead and Larkin, on account of Larkin's payment on said judgment as the surety of Mead," when said two notes or bonds were given for the balance due on account of said payment, after deducting the value of a tract of land which Mead had conveyed to his said sureties. R. C. Brickell, a witness for plaintiff, by whom the notes were written, and who was a party to the settlement, being asked "whether there was any agreement between Mead and Larkin that said notes should be taken as payment of the said debt from Mead to Larkin," answered, "I have no recollection that there was any agreement in reference to that matter." Said witness further testified, on cross-examination, that at the time said settlement was made there was a bill pending in the Chancery Court of Jackson county, by which Larkin was seeking to condemn a fund of about \$2,000, which he had attached, to the satisfaction of his demand against Mead; and that this suit was dismissed, by the written directions of the plaintiff, on the execution and delivery of the two notes on the settlement.

Samuel H. Lewis, a witness for the defendants, testified "that he was present with said Mead and plaintiff, when the said bonds were signed, and at the time referred to by said Brickell. Defendants offered to prove by said witness relevant statements and declarations made by said Mead, in the presence and hearing of said plaintiff, at that time; to which plaintiff objected, because of Lewis' interest and Mead's death. The court sustained the objection, holding that said Lewis was incompetent to testify as to transactions had with, or statements made by said decedent; to which ruling and decision the defendants excepted." This was all the evidence offered in reference to the settlement, or the circumstances attending the execution of the notes.

The court charged the jury, in writing, as follows: "This is a proceeding known as a contest of the claim of exemption, set up by the defendants to the property levied on by the sheriff under an execution issued from this court in favor of W. R. Larkin, the plaintiff in the cause. The plaintiff claims to be a judgment creditor of Lemuel G. Mead, deceased, and the defendants are the widow and minor children of said Mead. The burden of proof in this issue is on the plaintiff, and it devolves on him first to show to your satisfaction that, at the time of the

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death of said Mead, he had a judgment against said Mead, and had issued and placed in the hands of the sheriff, while said Mead was in life, an execution on his said judgment; and further, that he had executions on his said judgment regularly issued and placed in the hands of the sheriff, without the lapse of an entire term intervening between the times of holding courts in this county, up to the time of the levy by the sheriff on the lands claimed by the defendants. The terms of the court were held by law in February and October; and if the jury find, from the proof, that between the October term, 1877, and the February term, 1878, an execution was issued, and received by the sheriff during the life of the said L. G. Mead; and that executions were regularly issued between October and February of each year, and such executions were each received by the sheriff, up to the time the levy was made and claim of exemption filed by the defendants; then the plaintiff has shown his right to have the lands condemned and sold for the satisfaction of his debt, unless the lands so levied on are exempt from execution for the payment of debts. It is admitted by plaintiff, that the defendants are entitled to some exemption, to-wit: \$500 worth of the land, including the homestead; and the defendants insist, that they are entitled to the entire tract claimed by them. Under our law, the amount of the exemption is to be determined by the law which was in force at the time the contract was made, or the debt created. The question, then, for the jury to determine, is, when was the liability of Mead to Larkin created. By our law, one who becomes the surety of another, upon payment of the debt by him, becomes entitled to every remedy which the creditor has against the principal debtor, to enforce every security and all means of payment, and to stand in the place of the original creditor; and no property can be claimed as exempt from such debt, in the hands of the surety, that could not be claimed as exempt from the original debtor. If, therefore, the jury find that Larkin became surety for Mead, and, as such surety, paid the debt, or a part thereof, then he is subrogated to the rights of Townsend's executor, and no property could be claimed as exempt by the defendants against Larkin which Mead could not have claimed against Townsend's executor, unless Larkin had made a new contract, by which the original debt was paid, and a new debt created. Mrs. Mead and her children occupy the same position that Mead would occupy, if he were living, and are entitled to all the rights and claim to exemption that he would have. *The fact that the execution first issued was held up by plaintiff, did not destroy the lien of such execution; and such lien, not being so affected or destroyed as to Mead, is not destroyed as to these defendants; and not being destroyed, the jury must receive such execution as though no such*

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indorsement had been made on it. The debt of Mead to Townsend's executor, having been paid by Larkin, then became the debt of Mead to Larkin; and the exemption law of 1860 applies to this case, unless the evidence shows that the said debt has been paid. The mere giving of the note by Mead and Lewis to Larkin does not discharge or pay said old debt, unless there was an agreement, at the time of the execution of said note, that such note should be received in payment of said old debt; and whether or not there was such an agreement, is for the jury to determine. In determining whether there was such an agreement, the jury must look to all the facts attending the settlement of December 4th, 1874; such as, that the debt was then in judgment in Madison county, the pendency of the suit in the Chancery Court of Jackson county, the giving of the new note with surety, the dismissal of said chancery suit, and all facts and circumstances attending such settlement as may be shown by all the proof. If the jury come to the conclusion, that the old debt was settled and paid by the negotiations entered into by and between Larkin and Mead, culminating in the execution of said notes by Mead and Lewis, payable to Larkin, then the exemption law which was in force in 1874 would be applicable, and the verdict of the jury should be for the defendants. *If, however, the jury should find that the said notes of December 4th, 1874, were not [given?] in payment of the old debt, and received by Larkin in payment of said debt, then the exemption law which was in force in 1860 applies to this case; and by that law, lands in value not exceeding \$500, including the improvements, and in amount not exceeding 320 acres, would be exempt. Under the issue as framed in this case, the jury will have to ascertain the value of the land conceded by plaintiff to be exempt, to-wit," describing a portion containing about forty-five acres; "and their verdict must then be, 'We, the jury, find the issue for plaintiff, and assess the value of' said land, 'at \$——.'*"

To the several italicized portions of this charge, exceptions were duly reserved by the defendants, and also to the following charges given on request of the plaintiff:

1. "Although the jury may find that Mead and Lewis, on December 4th, 1874, gave the two notes in proof for the antecedent debt of January, 1860, or so much thereof as Larkin had paid as the surety of Mead; in such case, Lewis could plead the exemption law of 1872-3, which allowed 160 acres, under his contract; but neither said Mead, nor his widow and minor heirs, could claim a greater exemption than existed to him, Mead, in 1860, when he entered into the original contract; and the exemption or homestead, under that law (1860), was the residence and lands of the value of \$500."

2. "The giving of a note for an antecedent debt will not
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operate in law to discharge such debt, unless at the time it was accepted as an absolute payment. *Prima facie*, such a transaction is to be considered as a collateral, or additional security; but, if there was an express agreement to receive such new note as a satisfaction, or payment of the old debt, then it would be a payment. It is incumbent on the person pleading such new note, as a satisfaction of the old debt, to show that there was an express agreement at the time to accept the new note as a payment, and not as an extension of the time of payment."

3. "Neither the taking of a new note with security, for an antecedent debt, nor the dismissal of a bill in chancery filed for the purpose of collecting the amount due the plaintiff on such antecedent debt, nor the taking of lands in part payment, will operate in law a payment or extinguishment of the antecedent debt, without more and other proof showing, clearly and satisfactorily, that it was the intention of the parties to give and accept such new notes as a payment; and it is incumbent on the person pleading such matters as a payment to show to the jury, clearly and satisfactorily, either by an express agreement between the parties at the time, that the notes were so given and accepted at the time, or to show to the satisfaction of the jury, from facts and circumstances equivalent to an express agreement, that both of the parties so gave and accepted the new notes at the time as a payment."

The defendants requested the following charges:

1. "If the jury find that Larkin abandoned his claim upon the judgment in favor of Townsend's executor, and dismissed the bill filed to collect the same, and relied on the said notes given on December 4th, 1874, and sued on the same, obtaining judgments against both Mead and Lewis; then the jury are authorized to presume that the said notes were taken in payment of the said judgment, and the exemption law of 1874 would govern the case, and the defendants would be entitled to 160 acres as exempt from execution sale."

2. "If the two notes of December 4th, 1874, were given by said Mead and Lewis, and received by Larkin, not as a renewal of the debt evidenced by the judgment in favor of Townsend's executor, but as payment of the balance due Larkin on said judgment; then such notes constituted a new debt, to which the exemption law of force in 1874 applies. The jury will consider whether or not a new security was given upon said notes, and whether or not the pending suit of *Larkin v. Mead*, to collect said judgment, was dismissed upon the delivery of said notes; and if they find that such new security was given, and such suit dismissed, they can look to these facts as tending to show that the notes were received, not as a renewal, but as a payment."

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3. "If the jury find that Larkin abandoned his claim upon the judgment in favor of Townsend's executor, and dismissed the bill filed to collect the same, and relied on the notes given December 4th, 1874, and sued on the same, obtaining judgments against both Mead and Larkin; the jury should consider these facts as tending to show that the said notes were taken in payment of the said judgment, and the exemption law of 1874 would govern this case, and the defendants would be entitled to 160 acres exempt from execution and sale."

4. "If the jury find, from the evidence, that an execution issued from Larkin's judgment on the 3d December, 1877, returnable to the next term of the Circuit Court of Jackson county, and was received by the sheriff, and was levied by him on the real estate of the said Lemuel G. Mead on the 14th December, 1877, and was held up by direction of the plaintiff, as recited and shown in and by the return thereon indorsed, and also that said Mead died on the 14th January, 1878; then the lien of the execution was lost, and the homestead rights of Mead's wife and children attached, and could not be defeated by a subsequent levy."

The court refused each of these charges, and the defendants excepted to their refusal; and they now assign as error the several adverse rulings of the court on the pleadings and evidence, and in the charges given and refused.

WALKER & SHELBY, for appellants.

ROBINSON & BROWN, *contra*. (No briefs on file.)

SOMERVILLE, J.—A *contingent liability* is as fully protected against fraudulent and voluntary conveyances, as a claim which is certain and absolute; and, as often decided, "one whose claim accrued from a contract in existence at the time such conveyance is made, is a *creditor* within the meaning of the statute of frauds."—*Fearn v. Ward*, 65 Ala. 33; *Bibb v. Freeman*, 59 Ala. 612; *Jenkins v. Lockard's Adm'r*, 66 Ala. 377; Brandt on Sur. § 258. The *rights of the surety*, or other contingent promisor, are regarded, for many purposes, as commensurate in point of time with the date of the suretyship, and not with the date when the surety actually paid the security debt for the principal. The claim of the surety, in other words, is considered as having existed, so far as to constitute him a creditor, at the time he incurred the contingent liability, being *debitum in presenti, solvendum in futuro*; his subsequent payment of the debt extending back by relation to that date, although no demand, or right of action, technically accrues until a subsequent date. The surety is thus, in a certain sense, subrogated to the

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rights of the creditor whose claim he has been compelled to pay.—Bump on Fraud. Convey. 488–489; *Seward v. Jackson*, 8 Cow. (N. Y.) 406; *Gannard v. Eslava*, 20 Ala. 732; *Cato v. Easley*, 2 Stew. 214; *Jenkins v. Lockard's Adm'r*, 66 Ala. 377.

2. This principle applies to a claim of exemption preferred by a debtor, to property sought to be subjected to the satisfaction of a creditor's judgment. Parties entering into contracts are presumed to have in view such exemption laws and rights as are in force at the date of the contract.—*Kelly v. Garrett*, 67 Ala. 304, 309; *Smith's Ex. v. Cockrell*, 66 Ala. 64; *Nelson v. McCrary*, 60 Ala. 301; *Gunn v. Barry*, 15 Wall. 610. As against a surety, therefore, who has paid the debt of the principal, the right of the debtor to a homestead, or other exemptions, as to their value and extent are to be determined by the law which was in force when the contract of suretyship was entered into, and not by the law in force when the debt was actually paid; although, by express provision of the statute, the method and remedies for ascertaining and determining such exemptions are the same in each case.—Code, 1876, § 2844; *Fearn v. Word*, 65 Ala. 33; *Kelly v. Garrett*, 67 Ala. 309, *supra*.

The surety debt here created bears date December 4th, 1860; and the exemption allowed, if allowable at all, must be governed by the law in force at the date of its creation, *unless it was paid and extinguished* by the notes of Mead and Lewis, which are alleged to have been taken subsequently by Larkin in satisfaction of his claim against Mead. These notes are two in number, each bearing date December 4th, 1874, and payable to Larkin, in the sum of six hundred and thirty-four 92–100 dollars. They were executed by Mead as principal, with Lewis as his surety.

3. It is clear that the mere renewal, or novation, of an old debt by a new one, would not affect the exemption rights of a debtor. But, if the new obligation, taken by way of apparent renewal or extension, creates a different liability by reason of a change of parties, or otherwise, and is received with *the agreement* that it shall be taken in full payment and satisfaction of the original debt, it would clearly be otherwise. The exemptions of the debtor in the latter instance, as against the creditor, would be measured by the law in existence at the date of the new obligation.

4. Whether a new security of no higher nature, executed by a debtor, is taken in payment and discharge of a pre-existing debt, for which it is given, is a question of *intention*.—1 Greenl. Ev. § 519. The giving of the debtor's own note or bill, even though negotiable, does not, according to what is deemed the better doctrine, as settled in this State, operate to discharge

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such debt, unless accepted in absolute payment. *Prima facie*, it is considered only as collateral, or additional security; but all the authorities are "in harmony as to the proposition, that by *express* agreement it may be regarded as a satisfaction and a bar."—*Day v. Thompson*, 65 Ala. 269.

5. We are also clearly of the opinion, that it may as well be proved likewise by an *implied* agreement of the contracting parties. Both express and implied contracts are founded upon the actual agreement of the parties, the only distinction between them being as to the mode of proof, or evidence by which they are substantiated.—Story on Contr. § 11. There are, no doubt, some cases so free from ambiguity, or opportunity for inference, as that a court could legally presume such intention; but, in all cases of doubt, it is well settled to be a matter proper for the determination of a jury, who would have a right to consider all the relevant circumstances of the case throwing any light upon the question of intention.—2 Parsons Contr. 267; *Myatts v. Bell*, 41 Ala. 222; 2 Greenl. Ev. §§ 527, 519; *Fulford v. Johnson*, 15 Ala. 386; *Hart v. Boller*, 15 S. & R. (Penn.) 162; 1 Addison Contr. § 333 (*note* 1). It is true that the English decisions have adopted the view, that there must be an *express* agreement, or else that the bills alleged to have been received in payment must have been negotiated and remained outstanding against the defendant; and some of the earlier American decisions concurred in this doctrine. But, as Mr. Parsons observes, the modern authorities seem to be coming together in support of the other view. "In almost all of the States except New York," he says, "we suppose the note or bill of the debtor, or of a third party, may be payment by *implied*, as well as by express agreement; for there is no reason why the parties should not indicate their intention by *actions*, as well as by *words*. Where an implied agreement may be shown that the bill or note was taken in payment, all the facts are to be considered by the jury."—2 Parsons Bills & Notes, pp. 159–161, *note* (t), and cases cited. This conclusion seems fully sustained by the authorities and we, think, is supported by sound sense and good reason. We, therefore, adopt it as the correct rule.

The charge of the court was opposed to this view, and the exception based on it must be sustained.

6. The lien of the execution was not lost or suspended by reason of the plaintiff's direction to hold it up. Where a writ of *fi. fa.* is issued and received by the sheriff during the life of the defendant, as was the case here, "it may be levied after his decease, or an *alias* issued and levied, *if there has not been the lapse of an entire term, so as to destroy the lien originally created*."—Code, 1876, § 3213. It is clear that mere delay on the plaintiff's part, in executing his judgment, will not affect

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his lien, as against the defendant in execution, his personal representative, or heirs, who presumptively can not be prejudiced by it.—*Dryer v. Graham*, 58 Ala. 623. The principle upon which such a lien is lost by mere suspension is that of delay by the plaintiff for the purpose of favoring the defendant in execution, at the expense of other creditors, whose diligence may be thus paralyzed and rendered of no avail. It is, therefore, justly confined to junior creditors, mortgagees, or vendees who acquire intervening rights during the time the execution may be stayed by order of the plaintiff.—*Carlisle v. Godwin*, 68 Ala. 137; *Dryer v. Graham*, *supra*; *Johnson v. Williams*, 8 Ala. 529; *Dargan v. Waring*, 11 Ala. 988; Freeman on Ex. § 206; *Turner v. Lawrence*, 11 Ala. 427; *Patton v. Hayter*, 15 Ala. 18; 1 Brick. Dig. 899, § 140.

7. The Circuit Court was fully authorized, in our opinion, to try the issue involving the claim of exemption preferred by the defendants. We do not think the Probate Court was competent to do so, or even that the contest should have been inaugurated in that court, with the view of having the issue certified to the Circuit Court, under the provisions of sections 2838 and 2841 of the Code.—*Kelly v. Garrett*, 67 Ala. 304.

8. The execution against Mead, the decedent, was received by the sheriff during the life of the defendant; and the lien thus created was preserved, though the influence of the statute, by not permitting the lapse of an entire term without the continuous issue and levy of an *alias*.—Code, 1876, §§ 3213, 2633. Where this is done, the statute operates to authorize a sale of the land by the sheriff, in the same manner as if the defendant in execution were still living.—*Jones v. Ray*, 50 Ala. 599.

9. The Code does not seem to provide expressly for the regulation in detail of a claim of homestead exemption under these circumstances. Section 2840 has reference only to cases where the decedent did not, at the time of his death, reside on a homestead owned by him; in which event, the widow or minor children are authorized to select the homestead, from any other lands owned by the decedent. We think, upon clear principles of analogy, the provisions of section 2832 of the Code apply to this case with less friction of machinery than those of section 2841. The present execution was issued from a court of record, and necessarily returnable to the same tribunal. The section in question (2832) makes it the duty of the sheriff, or other officer, levying such process on a homestead, "to summon forth with three disinterested householders," whose duty it shall be "to allot and set off the homestead" under certain regulations which are prescribed in detail; a leading and important feature of which is, that the whole proceeding of allotment is measurably dictated according to the election of the owner, with the

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limitation only as to value and acreage, and contiguity to the dwelling-house of the debtor, which with appurtenances is required to be included. These commissioners are required to make a return of their written report under oath, after the execution of this duty, to the sheriff, and he then files it in the court to which the execution is returnable.—Code, § 2832.

This course was not pursued in the present case. The sheriff made no appointment of the requisite commissioners, and hence there was no report which could be made the basis of the exemption contest, which the plaintiff in execution is required to inaugurate. Nor were the defendants, or claimants, afforded any opportunity to make their own selection, within the meaning of our constitution describing the homestead, which is authorized to be exempted from sale under legal process, as one "to be *selected* by the owner thereof."—Const. 1875, Art. x, § 1; Code, §§ 2820, 2832.

The court committed no error in striking out the plea to its jurisdiction, and in excluding from the jury as evidence the exemption proceedings in the Probate Court, to which the plaintiff in execution was never a party.

10. The testimony of the witness Lewis was properly excluded, so far as it related to transactions with the decedent, Mead. He was the surety of Mead on the judgment debt, which is the basis of the present proceeding, and was, therefore, interested in the result. The defendants held title in succession under Mead; and any diminution of the rights of his estate necessarily operates as a diminution of theirs, and *e converso*. The rule of exclusion established by the statute has been held to embrace many who are *beneficial*, though not *nominal* parties to suits.—Code, § 3058; *McCrary v. Rash*, 60 Ala. 374; *Key v. Jones*, 52 Ala. 238; *Drew v. Simmons*, 58 Ala. 463; *Louis v. Easton*, 50 Ala. 470; *Waldman v. Crommelin*, 46 Ala. 580; *Dismukes v. Tolson*, 67 Ala. 386.

The judgment of the Circuit Court must be reversed, and the cause remanded.

BRICKELL, C. J., not sitting.

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1. *Statute of frauds as to contracts relating to lands; how pleaded.*—The statute of frauds, as a defense in equity to a bill which seeks the specific performance of a contract relating to lands, must be pleaded, unless the bill shows on its face that the contract is obnoxious to the provisions of the statute.

2. *Parol trust; sufficiency of evidence to establish.*—A trust in lands, created verbally, can not be established in equity, unless it is plain and unambiguous in its terms, and proved by clear and convincing evidence; and a trust in personal property, created verbally, and dependent entirely upon oral testimony, can only be established by clear and explicit evidence.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. H. C. SPEAKE, as special referee, under the statute approved February 23d, 1881.—Session Acts 1880–81, p. 66.

The bill in this case was filed on the 25th February, 1878, by Helen H. Bailey, an infant, who sued by her next friend, against William C. Irwin, who was her maternal grandfather, Samuel A. Bailey, her father, and several other persons; and sought to establish and enforce an alleged trust in a tract of land, the title to which the said Irwin had taken in his own name, and to certain personal property in his possession, consisting of mules, horses, farming implements, &c. The complainant was the only child of said Samuel A. Bailey, by his deceased wife, Mary, who was the only daughter of said William C. Irwin; and she sought by her bill to establish and enforce a trust in the lands and personal property, on two grounds: 1st, that a large portion of the purchase-money of the property was advanced by her mother, under an agreement with said Irwin that it should be invested by him in the lands for her benefit, although he took the legal title in his own name, in violation of said agreement; 2d, that a trust arose in her mother's favor, and in her favor on her mother's death, by operation of law, on account of the moneys so invested. The bill was filed while the case was pending of *Samuel A. Bailey v. W. C. Irwin* (reported *ante*, pp. 467–76), and the facts in the two cases were substantially the same; the complainant here recognizing the validity of the agreement sought to be enforced in that case, and seeking to enforce the alleged trust in the other portions of the property

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not embraced in that agreement. The respondent Irwin, in his answer, denied the alleged agreement, and the alleged use of his daughter's money in making the purchase, in these words: "Respondent purchased the said property in his own name, and claims that he bought the land for himself only. He did not use the money of the said Mary, his daughter, in making said purchase, but used his own money only; borrowing some of said money, and giving a mortgage to secure the same. Respondent does not say, and has not said, that he used a large amount of said Mary's money in the purchase of said land. What he does say is, that he gave said Mary certain moneys, a portion of which, amounting to \$6,700, she returned to him; and that said sum was used in part, in the purchase of said property, real and personal." He also pleaded the statute of limitations of three, six, and ten years. On final hearing, on pleadings and proof, the chancellor dismissed the bill, but without giving any reasons for his decree, so far as the record shows; and his decree is now assigned as error.

HUMES & GORDON, for appellant.—The testimony in this case being identical with that in the case of *Irwin v. Bailey*, at the present term, the appellant relies on the argument submitted in that case on the facts. That a resulting trust in the lands is established by the evidence, see *Caple v. McCollum*, 27 Ala. 461; *Crothers v. Lay*, 51 Ala. 390. That the statute of limitations is not available as a defense, where there is an express and continuing trust, as here, see cases cited in 2 Brick. Digest, 217-18, §§ 9-12.

WALKER & SHELBY, *contra*. (No brief on file.)

BRICKELL, C. J.—Whether the agreement the bill seeks to enforce, so far as it concerns lands, is not offensive to the statute (Code of 1876, § 2199) prohibiting the creation of trusts in lands otherwise than by writing, is not a question now presented. The statute is a substantial re-enactment of the seventh and eight sections of the English statute of frauds, though differing in phraseology, and has the same purpose,—the requisition of written evidence of trusts concerning lands, and the prohibition of the enforcement of such trusts resting merely in parol, when they arise from the agreement of the parties, and do not result from the implication or construction of law. *Patton v. Beecher*, 62 Ala. 579. A defense arising under the statute of frauds, unless upon the face of the bill it is shown the agreement sought to be enforced is not in writing, must be pleaded; and if not pleaded, and the agreement is admitted, or, if denied, is established by proof, it will be enforced.—*Patter-*

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son v. Ware, 10 Ala. 444. The statute of frauds was not pleaded by the defendant Irwin; he rested upon a denial of the making of the agreement; and the case is consequently reduced to the inquiry, whether the agreement as alleged is proved.

Though the statute of frauds is not pleaded or relied upon, it is essential that the trust, so far as it concerns lands, should be plain and unambiguous, and shown by clear and convincing evidence.—*Slocum v. Marshall*, 2 Wash. C. C. 397; *Mercer v. Stark*, 1 Sm. & Mar. Ch. 479. And if it is intended to fasten a trust upon personal property, created verbally, and dependent upon merely oral testimony, the testimony ought to be clear and explicit.—*Perry on Trusts*, § 77. We have carefully examined the evidence in this cause, and are of opinion that it is too conflicting, vague and indefinite, to establish the agreement alleged. Such was the conclusion of the chancellor, and his decree must be affirmed.

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Bill in Equity by Creditor, to set aside Fraudulent Conveyances.

1. *Parties to bill.*—When a creditor at large files a bill to reach and subject lands alleged to have been fraudulently conveyed by his debtor (Code, § 3886), the debtor himself, if living, is a necessary party defendant to the bill; and if he obtains a discharge in bankruptcy pending the suit, his assignee is a necessary party defendant.

2. *Testimony taken before cause is at issue.*—Testimony taken in a chancery cause before the cause is at issue as to a material defendant, is not admissible as evidence against him for any purpose.

3. *Suits by foreign executors or administrators.*—Under the statutes which were of force in 1867 (Rev. Code, §§ 2293-94), a foreign executor or administrator on the estate of a person who, at the time of his death, was not an inhabitant of this State, but had property here, was not authorized to maintain a suit here, if letters testamentary or of administration had been granted here; and under the law as since amended (Code, §§ 2637-38), while he is authorized to maintain suits and recover property here, on compliance with prescribed conditions, notwithstanding the prior appointment of a domestic administrator, the statute expressly declares that, "before a judgment is rendered in his favor, he shall prove to the court that he has complied in all respects with these conditions, and, failing to do so, can not recover."

4. *Same.*—In a suit brought by such foreign executor or administrator without a compliance with these statutory conditions, his bill being dismissed by the chancellor on other grounds, although his right to maintain the suit was denied by special plea; this court is bound to affirm the decree, although the statute of limitations has since barred a recovery by the domestic administrator.

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APPEALS from the Chancery Court of Madison.
 Heard before the Hon. N. S. GRAHAM.

L. P. WALKER, and CABANISS & WARD, for appellant.—The chancellor dismissed these bills on three several grounds: 1st, that the jurisdiction of the court could not be sustained under the act of 1877 (Code, § 2637), because the bills were filed before the passage of that statute; 2d, that the jurisdiction of the court in Tennessee, by which the complainant's letters were granted, was not proved; 3d, that the execution and indorsement of the notes, on which the suits were founded, was not proved. In each of these positions, the appellant contends that the chancellor erred. (1.) The act of 1877 contains an express provision, making it applicable to suits then pending; and this feature is not obnoxious to any constitutional provision.—*Page v. Matthews*, 40 Ala. 547; *Peevey v. Cabaniss*, 70 Ala. 253. For analogous decisions, see cases cited in 1st Brick. Digest, 364, § 59; 365, § 73; 371, § 158; 373, § 175. (2.) The grant of letters in Tennessee was certified as required by the act of Congress of 1790, and was entitled to the same credit and effect in Alabama as in Tennessee.—*Hampton v. McConnell*, 3 Wheaton, 234; *Slaughter v. Cunningham*, 24 Ala. 260; *Gunn v. Howell*, 27 Ala. 663. (3.) The original notes were produced, and, their execution not being denied by sworn plea, no other proof was necessary.—Code, § 3036; *Bonner v. Young*, 68 Ala. 35. (4.) The demurrer to the bill, for not alleging that there was no resident administrator, was properly overruled.—*Cloud v. Golightly*, 5 Ala. 654. The case last cited answers the argument, that complainant failed to prove a compliance with our statutory provisions, as required by section 2638 of the Code. Proof of such compliance was not required by the appellees, nor was its absence noticed by the chancellor; and the objection ought not to prevail in this court, to prevent a reversal, after a recovery by the domestic administrator has been barred by the statute of limitations.

JNO. D. BRANDON, *contra*.—(1.) The demurrer to the bills raised the question of the jurisdiction of the court, and was well taken. It is a fundamental rule of equity pleading, that the bill must state a case within the appropriate jurisdiction of the court.—*Chase v. Palmer*, 25 Maine, 341; *Hay v. Parker*, 12 Pick. 34; *Stephenson v. Davis*, 36 Maine, 73; Story's Eq. Pl. §§ 241, 257, 260–61; Mitford & Tyler's Pl. Eq. 246–48, Amer. ed. 1876; *McDonald v. Insurance Co.*, 56 Ala. 470. (2.) Complainant sues by virtue of letters of administration granted by the County Court of Davidson county, Tennessee, and alleges in her bill that said court had jurisdiction "to grant

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letters testamentary;" and there is no proof of the laws of Tennessee, though defendants denied and demanded proof. As to this matter, the allegations and proof are equally defective.—*Gunn v. Howell*, 27 Ala. 663; *Woodward v. Donally*, 27 Ala. 198; *Cockrell v. Gurley*, 26 Ala. 405; *Bradley v. Northern Bank*, 60 Ala. 252; *Minniee v. Jeter*, 65 Ala. 222; *McDonald v. Insurance Co.*, 56 Ala. 470; 1 Greenl. Ev. § 480; 2 Brick. Dig. 330, § 3. (3.) There was no proof that the notes were executed by W. H. Moore, and indorsed by the payees to Harris; and these were material averments, and should have been proved.—*McLane & Plowman v. Riddle*, 19 Ala. 180; *McKinley v. Irvine*, 13 Ala. 681. (4.) There was no decree *pro confesso* against Moore before his bankruptcy, and none was taken against his assignee; nor was there such a decree against Bankhead. The cause was, therefore, not at issue. Rules Ch. Pr., Nos. 30, 33, 52; *McIntosh v. Atkinson*, 63 Ala. 241; *McGehee v. Lehman, Durr & Co.*, 65 Ala. 315. (5.) Moore's discharge in bankruptcy was pleaded and proved, and the debts sued on were barred.—Bump on Bankruptcy, 518, 524; *Nat. Bank v. Olcott*, 46 N. Y. 12; *Miller v. McKenzie*, 20 Amer. Rep. 111. The bills should have been dismissed, because filed within less than four months before Moore's petition in bankruptcy was filed.—U. S. Rev. Stat. § 5044; 8 Bank. Reg. 473, 495; 31 Md. 478; 22 Wallace, 394. (6.) When these bills were filed, there was no law authorizing them, because there was a resident administrator already appointed in Alabama; and the point was presented by plea, regularly filed, after the demurrer was overruled. After the causes had been submitted for decision, and while they were under consideration by the chancellor, the act of February 5th, 1877, now forming section 2637 of the Code was passed; and in it was incorporated a special provision covering these cases, and declaring that they should not be "abated, barred, or affected," by the grant of administration here before the bills were filed. This feature of the statute, it is insisted, is an unwarranted interference with vested rights, and a clear usurpation of judicial functions by the legislative department. A right to sue is the very foundation of jurisdiction; and while the legislature may cure irregularities in existing proceedings, it can not confer jurisdiction where none existed at the commencement of the suit. It is the duty and prerogative of the General Assembly to determine what the law shall be in future—to law down new rules for the regulation of future controversies; but its resolves can not be made to retroact upon past or pending controversies, so as to create a liability or remedy in the particular case which did not exist before. The courts must determine pending causes by existing laws, and the legislature has no

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power to define their *status*, or to interfere between the parties, so as to confer a right of action, or impose a liability, where none existed at the commencement of the action.—Cooley's Const. Lim. 369, 371, 94; 1 Bla. Com. 44; *McDaniel v. Carroll*, 19 Illinois, 228; *Denny v. Mattoon*, 2 Allen, 361; *Walpole v. Elliott*, 18 Indiana, 259; *Nelson v. Roundtree*, 23 Wis. 367; *Griffin v. Cunningham*, 20 Grat. 109; *Richards v. Rote*, 68 Penn. St. 248; *State v. Doherty*, 60 Maine, 504; *Steele v. Steele*, 64 Ala. 438; *State v. Fleming*, 7 Humph. 152; *Burt v. Williams*, 24 Ark. 91; *Jackson v. Phelps*, 3 Caines. N. Y. 69; *Calder v. Bull*, 3 Dallas, 386; *Greenough v. Greenough*, 11 Penn. 489; *Taylor v. Place*, 4 R. I. 324; *Merrill v. Sherburne*, 1 N. H. 199; *Lewis v. Webb*, 3 Greenl. 140; *Bates v. Kimball*, 2 Chip. 77; *Holden v. James*, 11 Mass. 396; *Carleton v. Goodwin*, 41 Ala. 153; *Insurance Co. v. Boykin*, 38 Ala. 513; *Sanders v. Cabaniss*, 43 Ala. 173; *Weaver v. Lapsley*, 43 Ala. 224; *Wharton v. Cunningham*, 46 Ala. 593; *Pryor v. Downey*, 19 Amer. Rep. 656; *State v. Tappan*, 9 Ib. 622; *Yancey v. Yancey*, 5 Heisk. 365. (7.) Even if the act of 1877 can be made to apply to these cases, so as to cure the original want of jurisdiction, the bills were nevertheless properly dismissed, because the complainant failed to make proof of her compliance with its provisions; and therefore, in the imperative words of the statute (Code, § 2638), she "can not recover."

STONE, J.—These causes, which are identical in their main features, were long pending in the Chancery Court. The bills were filed in 1867, and the decrees were rendered in June, 1881, dismissing the bills. The chancellor, in his opinion, points out certain alleged imperfections in the preparation of the causes, and adds, "there are other irregularities."

According to the averments of the bills and the proof, William H. Moore became largely indebted to Benjamin D. Harris, a resident of the State of Tennessee. Harris died intestate, and Letitia J. Harris was appointed and qualified as his administratrix in the State of Tennessee. She brought these suits, as such administratrix, and in virtue of that appointment, under section 3886 of the Code of 1876. She sues as a creditor at large and without a lien, and seeks to subject to the payment of her claims certain real estate, alleged to have been conveyed by Wm. H. Moore with intent to defraud his creditors. The conveyances were to his children, and recited large indebtedness as the consideration. When these bills were filed, the children, grantees in said deeds, were all infants under twenty-one years of age. William H. Moore, the debtor and maker of the notes, was made a party defendant, and was a necessary party.

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Very soon after the bills were filed, Wm. H. Moore became a voluntary bankrupt, and H. L. Clay was appointed his assignee. At the June term, 1868, of the Chancery Court, the following minute-entry was made:

“Letitia J. Harris, adm’r,) Came the parties by their solic-
v.) itors, and comes also into open
William H. Moore *et al.*) court Hugh L. Clay, assignee in
bankruptcy of respondent, William H. Moore; and by his
consent this suit is revived [against] him as such assignee.”

At the December term, 1875, William H. Moore filed his plea of discharge in bankruptcy, accompanied by a copy of the certificate of discharge, which shows that it was granted October 27, 1870. This is the only pleading by Wm. H. Moore found in the record; and no decree *pro confesso* was taken against him.

On the 27th January, 1877, there was filed in the register’s office the written admission of complainant’s counsel that Wm. H. Moore had received his certificate of discharge in bankruptcy on 27th October, 1870. The record contains no answer or other pleading by Hugh L. Clay, the assignee, nor were any decrees *pro confesso* taken against him.

Much of the testimony of complainant was taken in 1868, and the parties continued to take testimony, at intervals, up to 1879.

It can not be gainsaid, that Wm. H. Moore, until he became an adjudged bankrupt, was a necessary party; and that any testimony taken before that time, without first putting the cause at issue with him, if any testimony was so taken, was irregular; and such testimony can not be looked to, as proving anything.—Rule 51, Ch. Practice. It is equally clear that, after said Moore was adjudged a bankrupt, and Hugh L. Clay was appointed his assignee, he became a necessary party, and testimony could not be lawfully taken in the cause, until it was put at issue with him. The result is, that none of the parol testimony taken in the cause, was lawfully taken, and the averments of the bill are unsustained by proof legally taken. But we do not decide the causes on this ground.

Benjamin D. Harris, the intestate, as we have shown, was a resident of the State of Tennessee, at the time of his death. Letitia J. Harris, the complainant in these suits, became his domiciliary administratrix, and she brought these suits in that right. When these suits were commenced (in 1867), there was a resident administrator of said estate, appointed by the Probate Court of Madison county, Alabama, and discharging the duties of the trust. Our statute (Rev. Code, § 2293) then provided, that “any executor, or administrator, who has obtained letters testamentary, or of administration, on the estate

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of a person who was not, at the time of his death, an inhabitant of this State, in any other of the United States (no letters testamentary or of administration having been granted in this State), may maintain suits, and recover or receive property in this State," on certain specified conditions. Letters of administration having been previously granted in this State, it is manifest this statute did not authorize the bringing of these suits.

So the law remained until 1877,—nearly ten years afterwards. A statute was then enacted, which became and is section 2637 of the Code of 1876. This was intended to so vary the former law, as to allow suits brought as these were to be prosecuted to judgment, whether brought before or after the enactment of the statute. The validity of the retroactive feature of this statute is claimed to be supported by *Page v. Mathews*, 40 Ala. 547 (limited in *Carleton v. Goodwin*, 41 Ala. 153); *Peevey v. Cabanis*, 70 Ala. 253. The latter statute, however, did not repeal section 2294 of the Revised Code, which is retained, and constitutes section 2638 of the Code of 1876. That section declares, "It is necessary that the plaintiff, before a judgment is rendered, should prove to the court that he has complied in all respects with the provisions of the preceding section, and, failing so to do, he can not recover." Among the provisions of the preceding section, it is enacted that such administrator of another State, suing in this, must record in this State a copy of the letter of administration, and give bond. Neither of these things is shown to have been done in this case. And section 2637 of the Code of 1876 permits an executor or administrator of foreign appointment to maintain suits, and recover or receive property in this State, only when he has previously recorded his letter of appointment and given bond; which fact he must prove to the court before he can recover.—Code of 1876, § 2638.

It is contended for appellant, that the failure of the present records to affirm these statutory requirements were complied with, can not become a question in this court. *Cloud v. Golightly*, 5 Ala. 653, is relied on in support of this argument. That case arose and was decided under the act of 1821, found in Clay's Digest, 227, § 31. The act of 1821, though in many respects similar to the provisions of the Revised Code on the same subject, is in phraseology somewhat different. The requirements of the old law were, that unless the letters testamentary, or of administration, were recorded in the proper county, and a certificate thereof produced before judgment rendered, "the court may direct a non-suit to be entered." In the case of *Cloud v. Golightly* (*supra*), the suit was by a foreign administrator, and the plaintiff had judgment in the court be-

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low. There was no plea of *ne unques* administrator, but there was simply a demurrer to the declaration. The record did not show that plaintiff, who claimed judgment by virtue of his foreign appointment, had complied with the requirements of the act of 1821 in such cases. The main error relied on was the failure of the record to show such compliance affirmatively. This court, after ruling that the defense insisted on should have been raised by special plea, laid down the rule in a case like that, as follows: "The court in which the foreign executor or administrator sues, may, of its own motion, require the production of the letters testamentary, &c.; and should, when its production is insisted on by the defendant, require it before judgment. But the omission of the record to show whether such a requisition had been made or insisted on, is not an error affecting the regularity of the proceedings." Let it be remembered that, in that case, the judgment of the court below was for the plaintiff; and it was not shown that the failure of the plaintiff to record the letters of administration before judgment was rendered, was brought to the notice of the court. It could not be raised on demurrer, for it was not required to be done before suit brought. The effect of the ruling was, that such question could not be raised in this court, unless "the defendant had appeared in court, and insisted that the plaintiff should entitle himself to judgment, by producing the evidence of his representative character; when the court would have been bound to act, and its refusal would have been fatal to the judgment."

The present statute is different. Its language (§ 2638) is: "It is necessary that the plaintiff, before a judgment is rendered, should prove to the court that he has complied in all respects with the provisions of the preceding section, and, failing so to do, he can not recover." The chancellor dismissed these bills, and the records fail to show the plaintiff had complied with the provisions of that section—2637. Counsel concede, in their arguments, that there was not a compliance with these provisions; and yet we are asked to reverse his decrees, and to grant relief, in the total absence of such compliance. Can we do so, in the very teeth of the statute, which declares that, in such conditions, the plaintiff "can not recover?" It should also be noted that, in these cases, there was a special plea, interposed in the court below, and insisted on there and here, that the complainant received her appointment in a foreign jurisdiction, and as such had no authority to maintain these suits. On this issue, was it not incumbent on the complainant, even under the act of February 5th, 1877 (Code, § 2637), to show herself entitled to decrees, by proving she had complied with its requirements?

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In the case of *Hatchett v. Berney*, 65 Ala. 39, the court, in discussing the power of a foreign administrator, said: "While, as to suits for the recovery of the assets, the title and authority of the personal representative of the last domicile of the deceased is confined and limited to the territorial jurisdiction of the government from which they are derived, or extended only to the *residuum* after the satisfaction of the claims and rights of residents of other jurisdictions in which ancillary administration may be taken; there is now presented a different question—whether, in the absence of a domestic administration, his title and authority may not be voluntarily recognized, and debts paid to him, or other assets surrendered; such payment or surrender affording full protection against the claim of a domestic administrator subsequently appointed. . . . Each State has the right and power of determining the disposition of all property having an actual *situs* within its jurisdiction, and the administration of it on the death of the owner. The personal representative of the last domicile may be left to the right and authority the general law recognizes; or that may be enlarged, and the right and authority of a domestic personal representative may be conferred on him, so far as is deemed politic; or all recognition of his right and authority may be withdrawn, or the terms on which he may exercise it and the validity of his acts recognized, may be prescribed.

"The statute of force when the transactions referred to in the bill occurred, authorized a foreign executor or administrator, who had obtained in any other of the United States letters testamentary, or of administration, on the estate of a person who was not at his death an inhabitant of this State, to *maintain suits, and recover or receive property in this State*, upon condition that, before judgment or receipt of the property, a copy of his letters, duly authenticated, was recorded in the office of the judge of probate of the county in which suit was brought, or property received; and giving bond, with two good and sufficient sureties, payable to, and approved by the judge of probate, in such amount as may be prescribed, to be determined with reference to the amount to be recovered or received, with condition to administer faithfully such recovery or property received. Before obtaining judgment, he was bound to prove a compliance with this condition; and when there had been a compliance with the condition, the recovery of judgment, or a delivery of the property to him, was a protection to the defendant, or person delivering the property, to the extent of such judgment, or value of such property.—Code of 1876, §§ 2637–2640.

"The statute is permissive, and prohibitory. It confers on
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the foreign executor, or administrator, the privilege or liberty of suing in our courts, without taking out new letters here, and the right of receiving, without suit, assets which are here situate. Each subject is embraced and dealt with by the statute; not only the privilege of suit by virtue of his original administration,—a privilege he did not have by the general law; but the right of receiving without suit assets here situate,—a right the general law recognized, when there was no domestic administration; and each is placed upon the same footing. The judgment obtained by him is a protection to the defendant, only when he has complied with the statutory condition; and the voluntary delivery of property to him, without suit, can be supported, only when there has been such compliance. Though the statute does not, in words, express a prohibition of suits, or the voluntary delivery to him of property, in the absence of a compliance with the condition; yet such is its manifest spirit and intent. It prescribes the terms, upon which he may exercise here the authority derived from a foreign jurisdiction; and to the extent to which there might be recognition of such authority, in the absence of compliance, there would be practical contravention of the legislative will."

In *Sloan v. Frothingham* (same volume, 593), it was said: "In *Hatchett v. Berney*, at the last term, it was held, that our statutes were in their terms prohibitory of the exercise of any authority in this State, by executors or administrators deriving authority from a foreign jurisdiction, and that payment made to administrators appointed in Tennessee, the domicile of the creditor, of a debt secured by mortgage on lands situate in this State, could not be sustained against the claim to foreclose, of a domestic administrator, subsequently appointed, except so far as such payments had been properly applied in payment of debts, or in making distribution. Adhering, as we are constrained to do, to that construction of the statutes, the personal representatives of Cary, deriving their appointment from a tribunal in New York, not having recorded their letters of administration, and given bond, could not have received payment of the mortgage debt, if it had been tendered to them by the mortgagor. They could not have given any discharge, or entered on the record of the mortgage the fact of its satisfaction. The power of sale in a mortgage, in the language of the statute, *is part of the security*; and while the statute declares it may be exercised by any person, or the personal representative of any person, who becomes entitled to the money secured, it is intended that only such persons as are entitled to the money, and have the capacity of giving for it valid and operative acquittances, can or shall exercise the power."—See, also, *Noonan v. Bradley*, 9 Wall. 394.

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The statutory provisions under which our former rulings, noted above, were made, are, on the question under consideration, identical with those which must govern these cases. Under those rulings, while a judgment or decree in favor of a foreign administrator, recovered without performance of the statutory pre-requisites (without which the statute declares "he can not recover"), is binding and conclusive on the defendant; yet a payment of such judgment or decree will be no defense to a suit on the same demand, brought by a resident administrator. And we are asked to reverse the chancellor's rulings, and to render decrees here, which will place the defendants in these suits in the very category supposed above. In the absence of proof that complainant had complied in all respects with the provisions of section 2637 of the Code of 1876, it was the duty of the chancellor to dismiss the bills. He did so, and committed no error, although he may have given other reasons for it. He did what the statute required him to do, and we can not say he erred therein.

It is no answer to this argument, that the claims sued on are now barred by the statute of limitations, and that therefore the defendants are not liable to a second recovery by the resident administrator. We are declaring a rule, which must be alike applicable to all cases. A conditional right to recover can not be enforced as matter of right, without showing a compliance with the conditions precedent to the assertion of such right.

We have stated above that the act of February 5th, 1877 (Code, § 2637), is, on its face, made retrospective; applicable to suits commenced before, as well as those commenced after its enactment. Without that statute, these suits could not be maintained, no matter how meritorious the claims they severally assert. The efficacy of the retrospective feature has been assailed; but we prefer to remain uncommitted on that question, until it comes before a full bench.

Let the decrees of the chancellor be affirmed.

BRICKELL, C. J., not sitting.

[Life Association of America v. Neville.]

Life Association of America v. Neville.*Bill in Equity by Surety against Creditor, asking Injunction and Cancellation of Note and Mortgage.*

1. *Discharge of surety by tender, or offer to pay by principal.*—A formal tender to the creditor, by the principal debtor, of the full amount of the debt after maturity, and the refusal of the creditor to accept it, discharge the surety; but a general offer to pay, not having the formalities of a legal tender, and not definitely refused by the creditor, has no legal effect on the liability of the surety, unless it operates to his injury or prejudice.

2. *Same.*—If the principal debtor was insolvent at the time when such informal offer was made and declined, the creditor's failure to accept it operates to the prejudice and injury of the surety, and therefore discharges him.

3. *Proof of collateral fact.*—When a fact arises collaterally, the rules of evidence do not require as strict proof of its verity, as when it is directly in issue.

4. *Proof of insolvency of decedent's estate.*—When notes and other presumptive evidences of debt are duly filed against a decedent's estate, exceeding in amount the available assets, the estate is, *prima facie*, insolvent; and proof of these facts sufficiently establishes the insolvency of the estate, when the question arises collaterally, although some of the claims may be litigated.

5. *Agent's authority to collect or retain.*—An agent of an insurance company, having authority to settle a policy of insurance on the life of a deceased person, whose estate is insolvent, has implied power to retain for a debt due from the decedent to the company, when the administrator offers to allow it.

6. *Sufficiency and weight of proof.*—The general principle is recognized, that when the evidence leaves a disputed fact in doubt and uncertainty, the issue must be found against the party on whom rests the burden of proof; yet courts and juries should rather weigh the testimony than count the witnesses, and should not render a decision on a mere preponderance which fails to produce a proper conviction in their minds.

7. *Contents of transcript; opinion on former appeal.*—An opinion delivered by this court, on a former appeal, is not properly a part of the record on a second appeal, and no costs will be allowed for it. "This rule has been heretofore announced, and the court sees fit to declare its purpose to adhere strictly to it in the future."

APPEAL from the Chancery Court of Madison.

Heard before the Hon. N. S. GRAHAM.

This case was before the court at its December term, 1879, on appeal from a decree dismissing the bill for want of equity; when the chancellor's decree was reversed, and the cause remanded.—63 Ala. 419. The bill was filed on the 20th May, 1879, by James T. Neville, as the administrator of the estate of Worley White, deceased, against the present appellant, a cor-

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poration chartered under the laws of Missouri, but doing business, through its agents, in Alabama. Its object and prayer was to enjoin a sale of lands under a power contained in a mortgage, and to have the mortgage and secured note cancelled and declared satisfied, on the ground that said Worley White signed the note only as the surety of one Mike White, since deceased, and was discharged from liability because, on a settlement had between said corporation and the widow and administratrix of said Mike White, the corporation paid to said administratrix the sum of \$7,500 on a policy of insurance on the life of said Mike White, and failed to retain the amount due on said note, although the administratrix offered to allow it, and the estate of said Mike White was insolvent. The amount of the policy was \$10,000, but \$7,500 was paid and received in full satisfaction of it. The settlement was made, or agreed upon, May 25th, 1878, by and between A. K. Fassett, the special agent of the insurance company, and L. W. Day, as the attorney of said administratrix. The defendant, in its answer to the bill, denied that the estate of said Mike White was insolvent, and denied that there was any offer by the administratrix, or by her attorney, to allow the amount of the note to be included in the settlement, or to be deducted from the amount of the policy; and these two questions of fact were the principal matters controverted.

Said L. W. Day, whose deposition was taken by the complainant, thus testified: "The said note for \$1200 was referred to in a conversation, or conversations, between said A. K. Fassett and myself, during his stay in Huntsville, pending an attempt to adjust the claim of Mrs. Mike White against said Life Association of America. I do not remember that it was mentioned at the time of the making of said receipt indorsed on the policy, as that receipt was the result of a settlement and compromise before that time agreed on. I will not attempt to state the exact conversation between said Fassett and myself, regarding said note. In substance, I suggested to him that, in the settlement between Mrs. White and said association, the debt of \$1200 be deducted from the amount which should finally be agreed on as payment to Mrs. White to satisfy the policy on her husband's life. He declined to adjust the \$1200 debt, saying that they settled, or, possibly, that he preferred to settle, one thing at a time. . . . I do not think the matter was mentioned at the time the money was paid. Mr. Fassett had declined to adjust said \$1200 debt, as before stated, and the compromise was made for \$7,500, wholly aside from any consideration of said \$1200 debt. My best recollection is, that nothing was said about the note on the day the payment was made in settlement of the policy. I can not state who first introduced the subject of the \$1200 note. I suggested that it

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enter into and become a part of the settlement we were attempting to make."

Fassett, whose deposition was taken by the defendant, denied that any offer was made as stated by Day, and thus testified: "I visited Huntsville, in May, 1878. I went there to settle a policy on the life of Mike White, deceased, which policy was in the Life Association of America. I was the special agent of said association to settle said policy. I think I know of the \$1200 note mentioned. My impression is, I did not have the note with me. I am quite sure I never saw the note referred to. When I came to Alabama to settle said policy, I knew that defendant held a note on Mike and Worley White, but the note was not due, the interest having been paid, and the note thus extended. Neither said Day nor Mrs. White ever proposed to me to pay said note, or to receive the same as part payment of said policy on the life of Mike White. I did not settle the policy, but gave the money, \$7,500, to Mr. Shelby, the lawyer, to settle it; and he brought me the policy receipted. As defendant's agent, I did settle the policy; but the money was paid through Mr. Shelby, as my agent."

As to the solvency or insolvency of Mike White's estate, said L. W. Day thus testified: "The debts presented against said White's estate amount to about \$9,456, [with?] interest. The entire assets that have come to the hands of the administratrix would amount to about \$7,800. Estimating the liabilities of said estate by the debts presented, it would be insolvent." He further stated, in answer to cross-interrogatories, that said administratrix, acting under his legal advice as her attorney, had paid several of the debts in full, and added: "It is true that I consider said estate solvent, but its solvency depends upon the result of litigation now pending in this court, under a bill filed by Mrs. White as such administratrix, to compel the cancellation and surrender of notes for a large amount presented against said estate; and my belief in the solvency of the estate is, of course, based on my opinion that she is entitled to, and will obtain, a decree in her favor under said bill." This was all the evidence adduced in reference to the condition of said White's estate.

On final hearing, on pleadings and proof, the chancellor held the complainant entitled to relief, and rendered a decree as prayed in the bill; and his decree is now assigned as error.

WALKER & SHELBY, for appellant.

D. P. LEWIS, *contra*.

SOMERVILLE, J.—There seems to be little or no doubt as

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to the doctrine, that if the principal makes a *formal tender* to the creditor, of the full amount of a debt already due, the creditor is bound to accept it, or, if he refuses to do so, the surety will be discharged.—Brandt on Suretyship, § 295. It is regarded, sometimes, as an extension of the loan, to which transaction the surety was not a party, and by which, therefore, he is not bound.—*McQuesten v. Noyes*, 6 N. H. 19. And, at other times, it has been pronounced a sort of fraud on the surety, whose relationship is said always to import entire good faith, and the utmost confidence.—*Saillen v. Elmore*, 2 Paige, 497.

The rule is not precisely the same, where there is a *general offer to pay* made by the principal, *without the formalities of a legal tender*, and unaccompanied by a definite refusal to accept on the part of the creditor. Such an informal offer, when refused by the creditor, is generally construed as a mere gratuitous indulgence, having no legal effect upon the liability of the surety, *unless it operates to prejudice or injure him*. Such is the doctrine recognized in *White's Adm'r v. The Life Association of America*, 63 Ala. 420, the title under which this case was reported when last before this court on appeal. It was also adjudged in that case, after a most thorough and exhaustive review of the authorities, that if the principal was *insolvent* at the time of the tender, thus informally made and declined, the case would no longer be one of mere gratuitous indulgence, such as the law tolerates with complacency, but of positive wrong to the surety, discharging his liability, because it operates to his prejudice and injury. It is unnecessary that we should further discuss these propositions. It is enough to announce that we here re-affirm them.

The evidence contained in the record is, in our opinion, sufficient to show, *prima facie* at least, that the estate of Mike White, the principal maker of the note due the appellant, was insolvent at the time of the transaction in question, in May, 1878. When a fact arises collaterally, the rules of evidence never exact as cogent proof in affirmation of its verity, as where it is directly in issue. If the notes of the intestate, and other presumptive evidences of his indebtedness, which are presented for payment to the administrator, exceed in amount the assets of the estate, which are available for the payment of debts, a *prima facie* case of insolvency exists. It is immaterial that some of these claims are in litigation, and are alleged to have been settled. If they are in the form of promissory notes, or other like written acknowledgments of indebtedness, which are in the possession of the creditor, the law does not presume they are paid, but the *onus* of such a defense is cast upon the maker. The proof seems clear that the estate was insolvent, provided the controverted debt of some eight thousand dollars, then in

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process of chancery litigation, remained unpaid as a subsisting claim against it,—a fact which must be assumed, in the absence of proof to the contrary.

It is urged that Fassett had no authority to collect the twelve hundred dollar debt due by White's estate to the Life Association of America, and that for this reason he was excusable for not accepting the offer of payment, even if, in truth and fact, it was made. Fassett is shown, however, to have been invested with the power *to settle* the policy of insurance on White's life, —a debt which was then due his estate. This general power, we think, embraces the special one to retain for a debt due by an insolvent estate, when an offer to pay in this manner was made by one representing the debtor. Especially is such an inference justifiable, in view of the fact that the appellant fails, in its answer to the bill, to deny the possession of such authority by its constituted agent, and the agent himself evades an answer to a special interrogatory touching the matter. The fifth direct interrogatory to Fassett's deposition, for example, reads as follows: "Did you, or not, have with you for collection, or *authority to collect*, a note against Mike White and Worley White, for \$1200?" *Answer*: "My impression is, that I did not have the note with me. I am quite sure I never saw the note referred to;" thus affirming nothing inconsistent with the authority to collect.

It is not contended by the appellee that there was any formal tender of the twelve hundred dollar debt to Fassett. It is only insisted that there was an offer to permit him to retain the debt, from the seven thousand five hundred dollars paid by the company, through him, in compromise of the policy of insurance on the life of Mike White. There is a plain conflict in the testimony on this point. Day, who was the attorney for the administratrix of White's estate, testifies very positively that the offer was made by him, and declined by Fassett, during the progress of the negotiations; for what reason, it does not clearly appear, except that the refusal was not referred to any want of authority in the agent. Fassett, in his testimony, denies Day's statement, and asserts that neither he nor the administratrix ever made such an offer. When subjected to cross-examination on the subject, however, his answers do not evince that entire candor and freedom from equivocation, which should ever be the handmaids of truth, and the presence of which strengthens a deponent's testimony as much as their absence must be construed to weaken it. While we fully recognize the principle, that whenever the evidence in a cause leaves a disputed fact in doubt and uncertainty, the issue must be found against the party upon whom the burden of proof rests; yet courts and juries should rather *weigh* than *count* the testimony of witnesses, and a de-

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cree or verdict should never be found by them on a mere preponderance which fails to produce a proper conviction or satisfaction in their minds, if, indeed, such conviction can, strictly speaking, ever be said to exist, in the absence of a preponderance of the evidence.—*Vanderverter v. Ford*, 60 Ala. 610. We are not inclined to reverse the finding of the chancellor on this issue, as we are far from being convinced that he was in error.

The opinion of this court, rendered on the former appeal taken in this case, is properly no part of this record, and should not have been copied in the transcript. No costs therefore will be allowed the register for this portion of the record,—a rule which has heretofore been announced, and one to which the court sees fit to declare its purpose to adhere strictly in the future.—*Lake v. Security Loan Association*, at the present term, *ante*, p. 207.

The decree of the chancellor is affirmed.

STONE, J., not sitting.

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Indictment for Murder.

1. *Presence of defendant in court when verdict is received.*—The recitals of the judgment in this case, representing the trial and all its incidents as one continuous, unbroken proceeding, and stating that the defendants were present in court when the trial was begun, show with sufficient certainty that they were also present when the verdict of the jury was returned and received.

2. *Asking defendant to show cause, if any, against judgment on verdict.* When the record recites that, before sentence was pronounced on the defendants, each of them was asked what he had to say why the sentence of the law should not be pronounced on him, it will be presumed that the inquiry was made by the court, or in its presence, and by its authority, in proper form.

3. *Relevancy of evidence connecting third person with killing.*—In a prosecution for murder, the evidence against the accused being altogether circumstantial, he may adduce evidence tending to show that the crime was in fact committed by another person; but such evidence, to be admissible, "must relate to, and be derived from the facts and circumstances of the killing;" and it is not permissible to prove, for this purpose, the hostile relations existing between the deceased and a third person, who is not shown to have had any agency in the homicide, or to have been near the place where it was committed at the time of its commission.

4. *Sufficiency of circumstantial evidence.*—The test of the sufficiency of circumstantial evidence, in a criminal case, is not whether it produces as full conviction as would be produced by the positive testimony of a

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single credible witness, but whether it satisfies the minds of the jury to the exclusion of every reasonable doubt.

FROM the Circuit Court of Jackson.

Tried before the Hon. H. C. SPEAKE.

The indictment in this case charged the defendants, Taylor Banks and Frances Wood, persons of African descent, with the murder of Turner Wood, "by shooting him with a shot-gun." The defendants were separately arraigned, and each pleaded not guilty; and issue being joined on that plea, and a joint trial had, each of them was convicted of murder in the first degree; Taylor Banks being sentenced to death by hanging, and Frances Wood to imprisonment in the penitentiary for life.

The judgment of the court, as set out in the transcript, was in these words: "Comes H. C. Jones, solicitor," &c., "who prosecutes for the State, and the defendants in their own proper persons, and by attorney; and the defendants having been arraigned at a former term of this court, by having the indictment read to them, and each of them having pleaded not guilty thereto; and it appearing to the satisfaction of the court, by the return of the sheriff of said county, that, pursuant to a former order of this court at this term, a copy of the indictment against the said Taylor Banks, together with a list of the jurors summoned for his trial, had been delivered by said sheriff to said Taylor Banks in person, at least one entire day before the 6th day of June, 1873, being the day set for his trial; and it further appearing to the satisfaction of the court, by the return of said sheriff, that, pursuant to a former order of this court at this present term, a copy of the indictment against said Frances Wood, together with a list of the jurors summoned for her trial, had been delivered to Paul Jones, one of her counsel of record in this case, for her, at least one entire day before the 6th day of June, 1883, the same being the day set for her trial; and now the said Taylor Banks and Frances Wood being in open court, the following jurors were drawn and charged, as required by law, to-wit," &c.; "and the said jurors being sworn according to law, thereupon the indictment was read to the jury, and the defendants again pleading not guilty thereto, and issue being joined on said plea; and after hearing the evidence and argument of counsel, and being charged by the court," [the said jury] "upon their oaths, the defendants being in open court, returned the following verdict: 'We, the jury, find the defendants guilty of murder in the first degree, and sentence Taylor Banks to be hung, and Frances Wood to the penitentiary for life.' And now the said Taylor Banks being asked, in open court, if he had anything to say

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why the sentence of the law should not be pronounced against him, and after hearing what he had to say, it is therefore ordered and adjudged, that the sentence of the law be carried into effect, by hanging the said defendant, Taylor Banks, by the neck until he is dead, on Friday, the 27th day of July, 1883; and the sheriff of said county is charged with the execution of this order and sentence, in the mode prescribed by the statute. And questions of law having been reserved by said defendant, on the trial of this cause, for the consideration of the Supreme Court, it is ordered by the court, that the execution of this judgment be suspended until this case is determined by the Supreme Court." And the judgment then contained the same recitals, *mutatis mutandis*, in the case of Frances Wood.

The evidence against the defendants was entirely circumstantial, and the bill of exceptions purports to set out "all the evidence necessary to make the defendants' exceptions intelligible;" but it is not necessary to set it out at length, and a condensed statement of it, if practicable, would subserve no useful purpose. The deceased, Turner Wood, was living with the said Frances Wood, one of the defendants, as his wife, when he was killed; and he was shot through the window of his house, or kitchen, soon after dark, on the night of March —, 1882. The State introduced evidence showing that the deceased and said Frances Wood had frequent quarrels, and that she had made recent threats against him, threatening to kill or to cut him if he beat her again, and saying "that she had a friend who would stand by her; that she had paid him thirty dollars, and would pay him forty more, *and in less than two weeks you will hear from it.*" The State introduced evidence, also, tending to show that Taylor Banks, who lived in the immediate neighborhood of the deceased, was the *friend* to whom said Frances referred, and to whom she had given the money; but this evidence was indefinite, and entirely inferential. The State introduced, also, evidence of tracks leading from the house of the deceased, on the night of the killing, to the house of said Taylor Banks; and no question was reserved as to the admissibility of any part of this evidence.

"The State introduced Moses Scott as a witness, who stated that, on the morning after the deceased was killed, he went with Ira Cobb and Joshua Kirby, and saw tracks leading from the place where the shooting was done, in a north-west direction, but saw no tracks leading in the direction of said Taylor Banks' house; that he heard said Banks say, after he was arrested, *that all he wanted was a fair trial—that he had twenty dollars to pay a lawyer, and could get forty more.* Defendant asked said witness, *if he was not the friend of Celia Wood.* Objected to by the State, and objection sustained. Defendant

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asked said witness, *if Celia Wood did not claim to be the wife of said Turner Wood, the deceased*; to which the State objected, and the objection was sustained, and defendants excepted. Defendants asked said witness, *if Celia Wood had not sued said Frances Wood for the property of Turner Wood which she had*; to which the State objected, and the court sustained the objection; to which the defendants excepted. Defendants asked said witness, *if he did not advise said Celia Wood to bring suit against said Frances Wood*; to which the State objected, the objection was sustained, and the defendants excepted."

The defendants requested the court, in writing, to charge the jury as follows: 1. "Before the jury can convict the defendants, they must be as well satisfied from the combination of circumstances that the defendants did the killing, as though an eye-witness had testified before them that the defendants did the killing." 2. "Before the jury can find either one of the defendants guilty, they must be as well satisfied from the combination of circumstances detailed that the defendants did the killing, or aided and abetted in the commission of the homicide, as though an eye-witness had testified before them that the defendants did the killing, or aided and abetted therein." The court refused each of these charges, and the defendants duly excepted to their refusal.

R. C. HUNT, PAUL L. JONES, and NORWOOD & NORWOOD, for the appellants.—(1.) The judgment-entry fails to show that the verdict was rendered in open court, in the presence of the prisoners; nor does it show that the prisoners were present in court when sentence was pronounced upon them.—*State v. Hughes*, 2 Ala. 102; *Crist v. State*, 21 Ala. 137; *Eliza v. State*, 39 Ala. 696; *Peters v. State*, 39 Ala. 681; *Graham v. State*, 40 Ala. 670; *Stubbs v. State*, 49 Miss. 716; *People v. Perkins*, 1 Wendell, 91; *Mills v. State*, 19 Ark. 476; *Willett v. Porter*, 42 Ind. 250; 1 Bish. Crim. Proc. § 1001; 3 Whart. Crim. Law, § 3197. (2.) The evidence adduced against the defendants being entirely circumstantial, and some of it tending to show a motive on their part to commit the crime, they ought to have been permitted to adduce evidence tending to show that some other person had a motive to commit it.—*Burrill's Cir. Ev.*, pp. 152-5, 184; *Ogletree v. The State*, 28 Ala. 693; *Hudson v. The State*, 61 Ala. 338.

H. C. TOMPKINS, Attorney-General for the State, contended that the judgment was in proper form, and, as to the admissibility of the evidence and the charges refused, cited *Levison v. The State*, 54 Ala. 520; 9 Ala. 990; 4 Dev. 328; *Faulk v. State*, 52 Ala. 415; *Mickle v. State*, 27 Ala. 20.

[Banks & Wood v. The State.]

BRICKELL, C. J.—The appellants, in due form of law, by a grand jury legally drawn, selected, summoned and organized, as is shown by the record, were indicted for the murder of Turner Wood; and upon trial before a petit jury, legally constituted and organized, they have been found guilty; and by the sentence of the court, pursuing the verdict of the jury, the one has been sentenced to death, and the other to imprisonment in the penitentiary for life. The first objection taken to the regularity of the proceedings is, that it is not shown affirmatively that the defendants were present in court when the verdict of the jury was returned. The objection is not sustained by the recitals of the record, which affirm their presence at the time the trial was entered upon, and represent as a continuous, unbroken proceeding, the trial and all its incidents, until the sentence of the law was pronounced by the court. The next objection is, that before pronouncing sentence it is not shown by whom the accused were asked what they, or either of them, had to say, why the sentence of the law should not be pronounced upon them. The record does show that, in open court, after each defendant had been inquired of, what he or she could say, and after hearing what each had to say, the court proceeded to pronounce the sentence. It would not be reasonable to suppose the inquiry was not made by the court, or by its authority, or that there was an indecorous, illegal obtrusion upon the regularity and order of the court, by some unauthorized and contemptuous agency, which the court recognized.

The evidence proposed to be introduced, and which was rejected as inadmissible, could have shown no more than that a third person, a stranger, not suspected or charged with violence to the deceased, not shown to have been in proximity to him when he was slain, was in hostile relations to him, and, if that hostility had resolved itself into murderous malice, may have resorted to murder for vengeance. The evidence was properly rejected. The accused could have shown that the deceased was slain by some one else than either of them, but the evidence of the guilt of another must relate to and be derived from the facts and circumstances of the killing.—*Levison v. State*, 54 Ala. 520.

The charges requested and refused state a proposition which has been repudiated directly, in at least two of the decisions of this court.—*Mickle v. State*, 27 Ala. 20; *Faulk v. State*, 52 Ala. 415. The test of the sufficiency of circumstantial evidence, tracing guilt to the accused, is not whether it produces as full conviction upon the mind of the jury, as would be produced by the positive testimony of a single credible witness; but the test is, does it satisfy the mind of the jury, excluding reasonable doubts.

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[St. Clair v. Caldwell & Riddle.]

We do not find in the record any error, and we are constrained to affirm the judgment of the Circuit Court.

St. Clair v. Caldwell & Riddle.

Statutory Trial of Right of Property in Mule.

1. *Amendment of verdict.*—A general verdict is always sufficient, when it responds in substance to every material fact involved in the issue; and the court may put it in proper form, with or without the consent of the jury; but, when the verdict is defective in substance, the court has no power to amend it, but should send the jury back for further deliberation; and if it is received, and the jury discharged, the court has no power to convene the jurors on a subsequent day, and let them perfect it.

2. *Same; form and sufficiency of verdict.*—In detinue, or the corresponding statutory action for the recovery of personal property in specie, brought by two plaintiffs suing jointly, both must recover, or neither can; and a claim to the property being interposed by a third person, a verdict in favor of one of the plaintiffs only is defective in substance, and can not be amended by the court; not can it be amended by the jury, on a subsequent day, after they have been discharged.

APPEAL from the Circuit Court of Jackson.
Tried before the Hon. H. C. SPEAKE.

L. C. COULSON, for appellant.

ROBINSON & BROWN, *contra*.

STONE, J.—Caldwell and Riddle jointly brought an action for a mule, against Fennell. The suit was under the statute which provides for the recovery of chattels in specie; and the plaintiffs having complied with the statute, by making oath that the property belonged to them, and by giving bond, obtained an order for the seizure of the property, and it was seized. Thereupon, St. Clair made claim to the property, under the statute, and a trial of the right to the property was then had between Caldwell and Riddle as plaintiffs, and St. Clair as claimant. The hour of adjournment having arrived, while the jury were considering of their verdict, counsel, in open court, agreed that the clerk might receive the verdict in the absence of the court. The verdict was brought in during the recess of the court, and was received by the clerk, and the jury permitted to disperse. The verdict was in the following form: "We, the jury, find a verdict in favor of plaintiff Rid-

[St. Clair v. Caldwell & Riddle.]

dle, and value the mule at ninety dollars, and its service at fifteen dollars a year; total amount, one hundred and twenty dollars." This was on the 16th October. On the next day, 17th, the attorneys for the parties were asked [by the court, manifestly], if they would consent that said verdict should be put in proper form; and defendant's attorney objected. "On the 19th of the month, the said jury, being replaced in the box on motion of plaintiffs' attorney, that said verdict should be placed in proper form, and being properly charged by the court as to the form of their verdict, returned into court the following verdict: 'We, the jury, find a verdict in favor of the plaintiffs, and against the claimant, St. Clair, and value the mule at ninety dollars, and the value of its service at thirty dollars.'" On this rendering of the verdict, judgment was pronounced by the court; and this is assigned as error.

As a rule, there is no particular form in which verdicts shall be rendered. General verdicts are always sufficient, if they respond in substance to every material fact involved in the issue. And doing this, the court commits no error by putting the verdict in form. The verdict may be either written or oral, and it is always sufficient, if it respond substantially to the questions of right the issue or issues raise. All else is form, which the court can supply with or without the consent of the jury.—*Ewing v. Sandford*, 21 Ala. 157.

It is different when the verdict is imperfect in substance, and does not respond affirmatively, or by necessary implication, to the issues as formed. Such verdict is imperfect, not in form, but in substance. The presiding judge should not receive an imperfect verdict, but should remand the jury for further deliberation, under appropriate instructions. If the court were to attempt to aid such verdict, it would become, not the verdict of the jury, but of the court.—*Lee v. Campbell*, 4 Por. 198; *Sewell v. Glidden*, 1 Ala. 52; *Layman v. Hendrix*, 1b. 212; *Wittick v. Traun*, 27 Ala. 562; *Clay v. The State*, 43 Ala. 350; *Walters v. Jenkins*, 16 Serg. & R. 414; Proffatt on Jury Trials, § 456.

The present action being by Caldwell and Riddle, suing jointly, the paramount fact to be found by the jury, to sustain their action, was their joint ownership of the mule. They had sued jointly, and, as the pleadings stood, must recover jointly, or not at all. Hence, when the jury returned a verdict that Riddle was entitled to recover, they did not respond to the issue before them, and no judgment in favor of the plaintiffs, or either of them, could be rendered upon it.

Could the court, three days afterwards, re-assemble the jury, and have them perfect their verdict? It would be a dangerous practice, and might lead to great abuse.—*Walters v. Jenkins*, VOL. LXXII.

[Rogers v. Peebles.]

16 Serg. & R. 414. No precedent for it has been produced or found. In the case of *Brister v. The State*, 26 Ala. 107, this court held that the jury, which amended its verdict in that case, had never in fact been discharged, or gone beyond the immediate, continuous control of the court. That case, then, is not an authority for the appellees. *Waller v. The State*, 40 Ala. 325, is strongly the other way. True, these were State cases; but, on the question we are considering, they tend strongly to put the Circuit Court in error in this case. The Circuit Court should have set the verdict aside, and awarded a *venire de novo*.

Reversed and remanded.

Rogers v. Peebles.

Bill in Equity to enforce Vendor's Lien on Land.

72 529
135 832

1. *Parol evidence varying or explaining deed.*—As between vendor and purchaser, in the absence of fraud or mistake, the deed executed and accepted must be regarded as the sole memorial and expositor of the terms of the contract between them, and parol evidence can not be received to vary, contradict, or explain it.

2. *Construction of deed, as to quantity of land conveyed.*—Where the lands conveyed by a deed are described by their subdivisions and numbers in the United States surveys, including fractional parts of several sections, with the words added, "making in all five hundred and twenty-seven acres," followed by a designation of the boundary lines on each side, as indicated by the adjacent lands and the river, and the price paid is a gross sum; the words specifying the quantity are mere matter of description, and not a covenant warranting the quantity.

3. *Husband's agreement, not binding wife or her property.*—The lands of the wife having been sold and conveyed by the joint deed of husband and wife, not containing any covenant or warranty as to quantity, a writing signed by the husband alone, more than a year afterwards, not founded on any new consideration, and agreeing to a re-survey of the lands with a view to the correction of any mistake as to quantity, can not impose any liability on the wife, or prejudice her rights in any way.

APPEAL from the Chancery Court of Limestone.

Heard before the Hon. THOMAS COBBS.

CABANISS & WARD, for the appellants.

McCLELLAN & McCLELLAN, *contra*.

SOMERVILLE, J.—The bill is one for the enforcement of a vendor's lien. The defense set up by the purchaser is, that there is a deficiency in the quantity of land sold him, amount-

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ing to about eighty-seven acres, for which he is entitled to compensation by way of an abatement of the purchase-money.

The defendant does not seek to reform the deed from the vendors, on the ground of mistake; nor is there any effort to rescind the sale on the ground of a false representation, or fraudulent concealment. In the absence, therefore, of any allegation of fraud or mistake in the execution of the deed, or of any subsequent modification of its terms, the instrument itself must be the sole memorial and expositor of the contract between the parties, and parol evidence is inadmissible to vary, contradict or explain it.—*Frederick v. Youngblood*, 19 Ala. 680; *Williams v. Hathaway*, 19 Pick. 387; *Winston v. Browning*, 61 Ala. 80.

The principal question raised for our consideration, then, becomes that involving the construction of the deed of Tucker and wife to Rogers, the defendant, bearing date in January, 1871. Does this deed import a warranty as to the *number of acres* described as being embraced in the tract of land conveyed to the vendee? The land is described by its subdivisions in the government survey, including fractional parts of three several sections, and is further and fully described by *its metes and bounds*, the Tennessee river being stated to be its southern boundary line. After the description by numbers is added the words, "*making in all five hundred and twenty-seven acres*," followed by the boundary lines indicated by adjacent lands and the river, as above stated.

We are of opinion that the clause designating the number of acres was intended by the parties as a part of the description of the land, and that it can not be construed to be a covenant as to quantity. In deeds where the phrase "be the same *more or less*," or words of like import are used, there is little or no difficulty. Such words are generally inserted for the purpose of making more manifest an intention to describe, and not to warrant.—*Carter v. Beck*, 40 Ala. 599; *Frederick v. Youngblood*, 19 Ala. 680, *supra*. It is true that there are no words importing such a signification in the present deed, but they are not considered essential. In *Wright v. Wright*, 34 Ala. 194, the description of the land sold was partly by its numbers in the government survey, and partly by metes and bounds, followed by the words "containing seven hundred and two acres, and the same being the settlement of lands at present occupied by said J. H.," the vendor. The sale there, as here, was made in gross, and not by the acre. It was held that the words were merely descriptive, and that they did not amount to a covenant of warranty as to quantity. The case was distinguished from *Minge v. Smith*, 1 Ala. 415, where the doctrine of warranty as

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to quantity in such cases seems to have been carried to a point beyond which we deem it unwise to further extend it.

We take the true principle to be, that where the land sold is described by definite boundaries, in regard to which there can be no mistake, if it be followed by a statement of the number of acres, as "*containing* — number of acres," or other phrase of like import, it is to be deemed a mere matter of description, and not as a covenant warranting the quantity intended to be conveyed. The buyer, in such cases, takes the risk of quantity, in the absence of any element of fraud. The same is true where the description is followed by words of qualification, as "more or less," or "by estimation," or the like. Whether a description by the government survey, giving sections, with subdivisions, and township and range, would answer the same purpose, we need not decide. But it is well settled that a description by metes and bounds comes within the rule.—4 Kent. Com. 467; *Pickman v. Trinity Church*, 122 Mass. 1; *Winston v. Brown-ing*, 61 Ala. 80; *Powell v. Clark*, 5 Mass. 355.

The conclusion we have reached can not be affected by the agreement of February 7th, 1872, set out in the defendant, Roger's deposition, and purporting to have been executed by Tucker in the name of his wife, agreeing to have the land surveyed, so as to correct any mistake in the estimate of quantity as made in the deed. The land sold was the property of the wife and not of the husband, being her statutory separate estate. It could be sold and conveyed only by an instrument in writing, executed jointly by husband and wife, and either attested by two witnesses, or else acknowledged before some officer authorized to take acknowledgments of conveyances.—Code, 1876, §§ 2707, 2708. The rights of the wife could not be prejudiced by an agreement of the husband, even though executed in her name, which bears date more than a year after the original contract of sale, does not purport to be the joint act of the grantors, is without witnesses or acknowledgement, and is not proved to be based on any new consideration.

The decree of the chancellor should, in our judgment, be affirmed.

[Turner v. Flinn.]

Turner v. Flinn.*Bill in Equity for Foreclosure of Mortgage.*

1. *Rights of innocent sufferers by wrongful act of third person, as between themselves.*—When one of two innocent persons must suffer from the tortious act of a third, he must suffer the consequences who gave the aggressor the means of doing the wrongful act.

2. *Same; equitable estoppel.*—Where a mortgagee of lands indorses on the mortgage a receipt for the secured debt before its maturity, and intrusts it to the possession of the mortgagor, pursuant to an agreement between them; and the mortgagor, being in possession of the lands, sells and conveys them to a third person, to whom he also shows the mortgage and indorsement thereon; the mortgage can not be established and enforced against such purchaser, after he has paid the purchase-money without notice of the agreement.

APPEAL from the Chancery Court of Lowndes.

Heard before the HON. JOHN A. FOSTER.

The bill in this case was filed on the 21st May, 1880, by Mrs. Rebecca Turner, against William R. Flinn, Robert Flinn, and Henry Jones; and sought to foreclose a mortgage on a tract of land. The mortgage, a copy of which was made an exhibit to the bill, was dated the 4th October, 1871, and was executed by said W. R. Flinn alone; but the note which it was given to secure was signed by said W. R. Flinn, Henry Jones, and Bunbury Flinn, as joint makers, and was payable on 1st November, 1872. The note was renewed several times, and the name of said Bunbury Flinn having been dropped, the balance due on the secured debt was evidenced by the joint note of said W. R. Flinn and Henry Jones, which was made an exhibit to the bill. The mortgage was in the possession of said W. R. Flinn when the bill was filed, and that fact was alleged in the bill; but it was alleged, also, that said mortgage had never been paid, satisfied, discharged, or surrendered, and that it was still a subsisting security for the balance due on the original debt. Robert Flinn was joined as a defendant, under an allegation that he was in possession of the lands conveyed by the mortgage, "claiming by and under some contract of lease or purchase from said W. R. Flinn." Each of the defendants filed an answer, and each denied that the mortgage was a valid and subsisting security; though W. R. Flinn and Jones admitted that the note made an exhibit to the bill showed the balance still due on the original note secured by it. Robert Flinn alleged that the mortgage had been satisfied and discharged long

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before he purchased the lands from W. R. Flinn; that at the time of his purchase, in February, 1877, and before he paid the purchase-money, W. R. Flinn informed him that there had been a mortgage on the land in favor of Mrs. Rebecca Turner, but said that it had been discharged and cancelled, and produced and exhibited to him the original mortgage, with Mrs. Turner's receipt indorsed on it; and he claimed to be entitled to protection as a *bona fide* purchaser for valuable consideration without notice.

The complainant's receipt, indorsed on the mortgage, was in these words: "Received the within amount, November 17th, 1871." In reference to this receipt, the answer of W. R. Flinn contained these allegations: "After the execution and delivery of said mortgage, complainant came to respondent, and told him that she desired to cancel and surrender said mortgage—that she had plenty of security without it; and thereupon she cancelled said mortgage in writing, and surrendered it to respondent, and he has held it ever since." The complainant herself thus testified in reference to this matter: "I have not seen the original mortgage since November, 1871, when I placed it in the possession of said W. R. Flinn. At that time, one D. H. Hill, pretending to have some claim against me, brought suit against me, and garnisheed W. R. Flinn and Henry Jones, who were indebted to me as aforesaid. Thinking this claim an unjust one, and being unwilling to have my claim against said Flinn and Jones complicated in the case, I made an agreement with said W. R. Flinn, who acted for himself and Jones, in substance as follows: I agreed to cancel the said mortgage, and deliver it to W. R. Flinn, who on his part agreed that the cancellation was to be considered in reality as a nullity, as no money had been paid on the secured debt, and no other consideration for the cancellation was given. I complied with my agreement, by cancelling the mortgage, and putting it in his possession; and said W. R. Flinn agreed with me, at the same time, that he would return the mortgage to me whenever Hill ceased to prosecute his pretended claim against me." W. R. Flinn thus testified as to these matters: "Complainant came to me on the 17th November, 1871, and said that Buell (?) had threatened to sue her for a debt she owed him; that she had security enough for the debt I owed her, exclusive of the mortgage on the land, and that she would cancel the mortgage, so that I could take it cancelled to Buell, and thereby prevent him from garnisheeing me for her debt. She did cancel it, and told me she had no claim on the land, and that I could so state to others. I did show it to Buell and others, and told them that it had been cancelled. I told said Robert Flinn, at the time of his purchase, that the mortgage had been cancelled,

[Turner v. Flinn.]

and exhibited the mortgage to him, with the complainant's receipt thereon indorsed." It was admitted that a discharge or satisfaction of the mortgage had never been entered on the record.

On final hearing, on pleadings and proof, the chancellor dismissed the bill; and his decree is now assigned as error.

R. M. WILLIAMSON, for appellant.—The indorsement on the mortgage is not a release, or acknowledgment of satisfaction, but is simply a receipt, and is open to explanation, at least between the parties.—1 Brick. Digest, 860, §§ 809–10. It is fully explained, and it is shown that a greater part of the mortgage debt is still unpaid, leaving the mortgage a valid security for it, unless the purchaser can claim protection against it. The possession of the secured note, by the mortgagor, would raise the presumption that it had been paid; but no such presumption arises from his possession of the mortgage, which had been duly recorded.—*Harrison v. Railroad Co.*, 19 N. J. Eq. 488; *Paxheimer v. Gunn*, 24 Mich. 372. The mortgage having been recorded, and no entry of satisfaction made of record, the purchaser was put on inquiry; and the receipt ought to have excited inquiry, since it was given long before the maturity of the debt, and had never been followed up by an entry of satisfaction on the record. The purchaser admits that he was informed there had been a mortgage on the land, and a man of ordinary prudence would have made further inquiry before completing the contract; failing to make any inquiry, he is chargeable with notice of all facts which inquiry would have developed.

GUNTER & BLAKEY, *contra*.—The facts make out a clear case of equitable estoppel.—*Dickerson v. Colgrove*, 10 Otto, 578; *Hendricks v. Kelly*, 64 Ala. 388; *Baker v. Humphrey*, 11 Otto, 494; *Cincinnati v. White*, 6 Peters, 431; *Brown v. Wheeler*, 17 Conn. 353; *Lasselle v. Barnett*, 12 Amer. Dec. 217. Receipts and discharges in writing must have effect according to the intention of the parties.—Code, § 3039; *Hart v. Freeman*, 42 Ala. 567.

BRICKELL, C. J.—The undisputed fact is, that the appellant deliberately indorsed, upon the face of the mortgage she now seeks to foreclose, an acknowledgement of its satisfaction, and then intrusted it to the possession of the mortgagor. It is a fact fully proved, that while in possession of the lands, the mortgagor made a sale of them, for a valuable consideration, to the appellee, Robert Flinn, to whom the mortgage, with the acknowledgment of satisfaction, was shown, and who paid the purchase-money, and received a conveyance, without notice, and

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in ignorance of the agreement between the appellant and mortgagor, upon the faith of which she now avers the acknowledgment of satisfaction was made, and possession of the mortgage intrusted to the mortgagor. If the appellant came into court with clean hands, she could not be relieved. The law simply utters the suggestion of common sense and justice, in declaring that, "when one of two innocent persons must suffer from the tortious act of a third, he who gave the aggressor the means of doing the wrong must bear the consequences of the act."—*Bank of Kentucky v. Schuylkill Bank*, Parsons' Select Eq. Cases, 248.

Let the decree of the chancellor be affirmed.

Crowder v. Morgan.

Action on Writ of Error Bond.

72 535
1885 400

1. *Appeal or writ of error bond in Federal courts; costs recoverable on affirmance, though bond not operative as supersedeas.*—In an action on an appeal or writ of error bond, given on the removal of a judgment from a Circuit Court to the Supreme Court of the United States, and conditioned that the appellant or plaintiff "shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good" (U. S. Rev. Stat. §§ 1,000 *et seq.*), although the bond may not operate as a *supersedeas* of the judgment, a recovery may be had for the costs of the appeal, if the judgment is affirmed.

2. *Same; when operative as supersedeas.*—Under the United States statutes regulating writs of error and appeals (Rev. Stat. §§ 1,000 *et seq.*), as judicially construed by the Federal courts, the bond does not operate as a *supersedeas* of the judgment, unless it is approved by a justice or judge of the Circuit Court, and a copy of the writ of error is deposited, for the adverse party, with the clerk of said court.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. H. C. SPEAKE.

This action was brought by Mrs. Nannie A. Morgan and her infant children, suing by her as their next friend, against John M. Crowder and Mrs. S. L. Davis; and was commenced on the 18th September, 1880. The action was founded upon a penal bond signed by the defendants jointly with the Piedmont and Arlington Life Insurance Company, for whom they were sureties, which was dated January 2d, 1877, and conditioned as follows: "Whereas, lately, at a regular term of the Circuit Court of the United States for the Middle District of Alabama, at Montgomery, in said State, in a suit depending in said court between said Nannie A. Morgan, Minnie Bell Morgan, George W. Morgan, and Ida C. Morgan, as plaintiffs, and the Piedmont

[Crowder v. Morgan.]

and Arlington Life Insurance Company as defendant, judgment was rendered against the said defendant, for the sum of \$5,217.59; and the said defendant having obtained a writ of error, and filed a copy thereof in the clerk's office of said court, to reverse the said judgment in the said suit, and a citation directed to the said Nannie A. Morgan" and her said children, "citing and admonishing them to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next: Now, the condition of the above obligation is such, that if the said Piedmont and Arlington Life Insurance Company shall prosecute said writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the above obligation to be void," &c.

The complaint contained two counts. The first count set out the bond, with the indorsements thereon; alleged the affirmance of said judgment by the Supreme Court, during its October term, 1879, with \$500 damages, besides costs, which were taxed at \$140.05; and alleged the following breach of the condition of the bond: "That the said Piedmont and Arlington Life Insurance Company has failed to make its plea good, and has failed to prosecute its said writ of error to effect; and has failed to pay and answer said judgment of said Circuit Court, in said bond described, together with the lawful interest thereon since the rendition thereof; and has failed to answer and pay the said sum of \$500, so awarded as damages to plaintiffs by said Supreme Court; and has likewise failed to pay and answer said sum of \$140.05, costs in said Circuit Court, as taxed; but has allowed the same to be and remain unpaid," &c. There was a demurrer to this count, alleging several specific causes of demurrer, which were in substance—1st, that the bond was without consideration, because it appeared on its face to have been given and intended as a *supersedeas* bond, and was not taken or approved by a justice or judge of said Circuit Court; 2d, that the bond was not valid and operative, because it was not averred or shown that a copy of the writ of error, for the adverse party, was lodged with the clerk, or filed in his office; 3d, that the complaint showed that the bond was not taken within the time prescribed by law, and by an officer authorized to take it. The same causes of demurrer were also assigned to the second count, which set out the order allowing the writ of error, and directing that it should operate as a *supersedeas*, on the execution of a bond and its approval by the clerk of the court; alleged the execution of the bond and its approval by the clerk, whereby it became operative as a *supersedeas*; alleged also the affirmance of the judgment by the Supreme Court, with damages, interest, and costs; and alleged as breaches, in substantially the same language as the first count, the failure to pay said judg-

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ment, interest, damages, or costs. The court overruled the demurrers, and the defendants then pleaded, "in short by consent, 1st, the general issue, with leave to give in evidence any matter which, if specially pleaded, would be a good plea in bar; 2d, want of consideration; 3d, failure of consideration;" and several special pleas, which averred, in substance, that the bond was never operative as a *supersedeas*, because it was not taken or approved by a justice or judge of the Circuit Court, and because a copy of the writ of error was not lodged with the clerk. Issue seems to have been joined on all of these pleas.

On the trial, as the bill of exceptions shows, the plaintiffs offered in evidence a certified transcript of the record of the cause in which the said bond was taken, showing the judgment rendered in said Circuit Court of the United States at Montgomery, the order granting the writ of error, the writ of error and bond, and the certificate of affirmance issued by the clerk of the Supreme Court of the United States at Washington. The judgment of said Circuit Court was rendered on the 15th December, 1876; and the order allowing the writ of error, which was made on the 22d December, 1876, was in these words: "Upon the application of the defendant in this cause for a writ of error and *supersedeas* in this cause, it is ordered that the defendant be allowed until the 15th day of January next to file its bond with two sureties, to be approved by the clerk, payable and conditioned in the usual form, in double the amount of the judgment; and when so filed, *supersedeas* shall take effect." The writ of error was allowed by Hon. W. B. Woods, the presiding justice of said Circuit Court, and was marked by the clerk "Filed December 22d, 1876;" while the bond was approved by the clerk, and marked by him "Filed 15th January, 1877." The defendants objected to the admission of the transcript as evidence, "first, because there is a variance between it and the allegations of the complaint; second, because it was incompetent and illegal evidence." The court overruled the objections, and the defendants excepted. This was all the evidence offered by the plaintiffs. The defendants then proved by J. W. Dimmick, the clerk of said Circuit Court at Montgomery, that the original writ of error was filed in his office, but that no copy thereof for the adverse party was ever filed in his office. The defendants then testified, as witnesses for themselves, "that they never appeared before the clerk of said Circuit Court, or the judge of said court, in reference to said bond, its approval, their justification, and signatures to it; that they signed the bond in Huntsville, before A. W. McCullough, United States commissioner, and had no notice or knowledge of any of the proceedings in said cause in the Supreme Court of the United States, further than is disclosed by said bond,

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until after the judgment of affirmance by said Supreme Court."

This being all the evidence, the court charged the jury, on the request of the plaintiffs, "that they must find for the plaintiffs, if they believed the evidence;" and further, "that they should return a verdict for the plaintiffs, for the amount of the judgment of said Circuit Court at Montgomery, with interest thereon from the day of its rendition, and for the amount of damages awarded by the Supreme Court on its affirmance, in addition to interest, but no interest to be charged on said damages." The defendants excepted to each of these charges, and requested the court to instruct the jury, "if they believed the evidence, they must find for the defendants;" which charge the court refused, and the defendants excepted to its refusal.

The rulings of the court on the pleadings and evidence, the charges given, and the refusal of the charge asked, are now assigned as error.

HUMEN, GORIXON & SHEFFEY, and L. W. DAY, for the appellants.—The bond is, in form, a statutory obligation; and each count, in legal effect, declares on it as such. But, whether the second count be construed as declaring on it as a statutory or as a common-law obligation, the demurrer to it should have been sustained; because, if sued on as a statutory bond, it never had that effect, not having been approved by the judge of the court, and no copy of the writ of error having been lodged with the clerk; and if as a common-law obligation, it was not supported by any sufficient consideration, since its recitals show that its sole consideration was the *supersedeas* of the judgment, and that it did not have that effect. It was essential that the bond, to have the effect of a *supersedeas*, should be approved by the judge, and that a copy of the writ of error should be lodged in the clerk's office, as required by statute.—U. S. Rev. Stat. §§ 1,000 to 1,007; *Goddard v. Ordway*, 94 U. S. 672; *Slaughter House cases*, 10 Wall. 273; *Hudgins v. Kemp*, 18 How. 530; *Adams v. Law*, 16 How. 148; *Railroad v. Harris*, 7 Wall. 574; *O'Dowd v. Russell*, 14 Wall. 402; *Hogan v. Ross*, 11 How. 295; *Kitchen v. Randolph*, 93 U. S. 86; *Salt-marsh v. Tuthill*, 12 How. 387; *United States v. Curry*, 6 How. 113; *Comm'rs v. Gorman*, 19 Wall. 661; 1 Cr. C. C. 532; *Bangs & Co. v. Railroad Co.*, 23 How. 1; *Black v. Zacharie*, 3 How. 494; *O'Reilly v. Edrington*, 6 Otto, 724; *Nat. Bank v. Omaha*, 6 Otto, 737; *United States v. Hodge*, 3 How. 534. For similar decisions, under State statutes, see *Eustis v. Holmes*, 48 Miss. 34; *Ex parte Sibert*, 67 Ala. 349; *Mining Co. v. Pulling*, 89 Illinois, 58; 7 Daly, N. Y. 95; *Blanchard v. Wolff*, 1 Mo. App. 520; *Ham v. Greve*, 41 Indiana, 531. The bond was without any consideration, and was not valid as a common-

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law obligation.—*Sears v. Bearsh*, 7 La. Ann. 539; *Sewall v. Franklin*, 2 Porter, 493; *Whitsett v. Womack*, 8 Ala. 466; *Alston v. Alston*, 34 Ala. 15; *Steele v. Tutwiler*, 63 Ala. 369; *Copeland v. Cunningham*, 63 Ala. 394. The defendants are not estopped from assailing the consideration or validity of the bond.—*Adams v. Olive*, 57 Ala. 250; *Benedict v. Bray*, 2 Cal. 251; *Perry v. Hensley*, 14 B. Monroe, 474; *Thompson v. Lockwood*, 15 John. 256; *Merriam v. Railroad Co.*, 17 Mass. 241; 38 Indiana, 521; *Hamner v. Cobbs*, 2 Stew. & P. 383. If the plaintiffs were entitled to recover at all, no proof of damage being made, they could only recover nominal damages.—*Marcum v. Burgess*, 67 Ala. 556; *Bagby v. Harris*, 9 Ala. 173; *Moore v. Anderson*, 20 Texas, 224; *Probate Court v. Slason*, 23 Vermont, 306; 24 Md. 310; 13 B. Monroe, 330; 31 Mo. 95; 4 Rob. N. Y. 372; *Omaha Hotel Co. v. Kountze*, 17 Otto, 378.

JNO. D. BRANDON, and W. R. NELSON, *contra*.—If the plaintiffs were entitled to recover under either count, the judgment will be sustained.—*Telegraph Co. v. Meyer*, 61 Ala. 161; *Smith & Gary v. Aubrey*, 19 Ala. 165. The demurrer was to each count as whole, and denied any right of recovery at all; and if plaintiffs were entitled to recover only the costs, the demurrers were properly overruled. If the bond should be held defective as a statutory *supersedeas* bond, it is nevertheless valid as an appeal bond, and is supported by a sufficient consideration to uphold it as a common-law obligation.—*Sprawl v. Lawrence*, 33 Ala. 692; *Alston v. Alston*, 34 Ala. 21; *Williamson v. Woolf*, 37 Ala. 298; *Musterson v. Matthews*, 60 Ala. 260; *Munter v. Reese*, 61 Ala. 395; *Jenkins v. Lockard's Adm'r*, 66 Ala. 377; *United States v. Tingley*, 5 Peters, 115; *United States v. Linn*, 15 Peters, 315; *United States v. Hodson*, 10 Wallace, 409; *Hester v. Keith & Kelly*, 1 Ala. 316; *Gayle v. Martin*, 3 Ala. 593; *Whitsett v. Womack*, 8 Ala. 466; *Adams v. Olive*, 57 Ala. 249. But the bond was valid and sufficient as a statutory bond. The provisions of the statute are directory merely, and not mandatory; and being intended for the protection and benefit of appellees, they may waive any imperfection or informality. The bond was, in legal effect, taken by the judge, acting through the clerk; and it was approved by the clerk, under an order which was made at the instance of the appellants, which was binding until revoked, and which has never been revoked. It was a substantial compliance with the statute, and has answered all the purposes of a *supersedeas* bond. *United States v. Tingley*, 5 Peters, 128; *Davidson v. Lanier*, 4 Wallace, 447; *Ex parte Railroad Co.*, 5 Wallace, 188; *Seymour v. Frier*, 5 Wallace, 822; *Rubber Co. v. Goodyear*, 6 Wallace, 153; *Supervisors v. Camper*, 3 Wendell, 49; *Ohio*

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v. *Bowman*, 10 Ohio, 445; *Fellows v. Gilman*, 4 Wendell, 414; *Clayton v. Antony*, 18 Grat. 578; *Lawton v. Irwin*, 9 Wendell, 236. The defendants are estopped from denying the validity of the bond, either as a statutory bond, or as a common-law obligation.—Herman on Estoppel, §§ 229–55; Bigelow on Estoppel, 295–318; Brandt on Suretyship, §§ 29, 30, 363; *George v. Bischopp*, 68 Ill. 237; *Robertson v. Coker*, 11 Ala. 466; *McClure v. Colclough*, 17 Ala. 89; *May v. Robertson*, 13 Ala. 86; *Firemen's Ins. Co. v. McMillan*, 29 Ala. 147; *Spence v. Rutledge*, 11 Ala. 590; *Wright v. Lang*, 66 Ala. 389; 12 Vermont, 39; 18 Howard, 289; *Mason v. Richards*, 12 Iowa, 73; *People v. Edwards*, 9 Cal. 286; *McCracken v. Todd*, 1 Kansas, 148; 14 La. Ann. 736; *Cranford v. Hannon*, 9 Geo. 814; *Bank v. Smith*, 5 Allen, 413; 16 Gray, 473.

STONE, J.—This is a suit upon an appeal bond, by which a judgment of a Circuit Court of the United States was carried to the Supreme Court, and there affirmed. The complaint has two counts; one claiming that the bond is a statutory *supersedeas* bond; the other, counting on it as a common-law obligation. Each count, however, is sufficient, if we treat the bond simply as a common-law undertaking; and each assigns, as a special breach, that the appeal was not prosecuted to effect, and that the costs of appeal were not paid. To this extent, there can be no question that appellees were entitled to recover, and the demurrer was properly overruled.—*Hughes v. Hatchett*, 55 Ala. 539; *Drake v. Webb*, 63 Ala. 596; *Shelton v. Otis*, at the last term. *

Under the act of Congress, and the rulings thereon, we feel bound to hold that the bond did not, and could not, operate as a *supersedeas*. It was not approved by a judge of the Circuit Court, and a copy of the writ of error, for the adverse party, was not deposited with the clerk, as the statute requires. *Black v. Zacharie*, 3 How. U. S. 483; *O'Reilly v. Edrington*, 96 U. S. 724; *National Bank v. Omaha*, *Id.* 737; *Railroad Company v. Harris*, 7 Wall. 574; *O'Dowd v. Russell*, 14 Wall. 402; *Anson v. Railroad Company*, 23 How. 1; *Hogan v. Ross*, 11 How. U. S. 294; *Davenport v. Fletcher*, 16 How. 143; *Hudgens v. Kemp*, 18 How. 530; *Slaughter House cases*, 10 Wall. 273, 290; *Goddard v. Ordway*, 94 U. S. 672; Rev. Stat. U. S. §§ 1,000, *et seq.*

The rulings of the Circuit Court are not reconcilable with the views above expressed.

Reversed and remanded.

* This case has never been reported, the opinion having been lost or mislaid. REP.

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Dothard v. Denson.*Statutory Real Action in nature of Ejectment.*

1. *Struck jury in civil cause; challenge for cause.*—When a struck jury is demanded in a civil cause, although the statute provides that, from the list of jurors in attendance upon the court, furnished by the sheriff, "a jury must be obtained by the parties striking alternately one from the list until twelve are stricken off," and that "the jury thus obtained must not be challenged for any cause" (Code, § 3018); yet either party may challenge a juror for cause, on account of bias or interest in the particular case; and the fact that a juror served in that capacity on a former trial of the cause, which resulted in a mistrial, is good ground of challenge for cause.

2. *Adverse possession; what constitutes.*—Although a deed may be necessary to show a valid title to land, it is not an essential element of adverse possession, which may be acquired and held under a sale of which there is no written evidence.

3. *Declarations of person in possession of land.*—The declarations of a person in possession of land, as to the nature and character of his possession, are competent evidence in his favor; but his statements as to the person from whom he bought it, and as to the price paid, are merely narrative of a past transaction, and are not admissible as evidence.

4. *Possession as evidence of title.*—A plaintiff in ejectment may recover upon proof of possession merely, as against an intruder or trespasser, or one who does not show a better right; but possession is presumed, in the absence of all evidence to the contrary, to be rightful, and in subordination to the true title; and the burden of proving it to be adverse, as against the owner of the legal title, is on the party asserting it.

5. *Adverse possession; what constitutes.*—Good faith in claiming possession and title is an indispensable element of adverse possession; but this does not imply or involve a belief on the part of the possessor in the strength or validity of his title.

6. *Same.*—When a person enters into the possession of land as the tenant of another, or in subordination to the title of another, his possession does not become adverse as against that person, until there has been a disclaimer and disavowal of his title, and notice thereof brought home to him, either actual, or so open and notorious as to raise the presumption of notice; and this possession does not ripen into a title, unless continued subsequently, without interruption, for ten years.

APPEAL from Circuit Court of Cleburne.

Tried before the Hon. LEROY F. BOX.

This action was brought by William Dothard, against Philip Denson and others, to recover the possession of a small tract of land, particularly described in the complaint; and was commenced on the 17th July, 1877. The defendants pleaded the general issue, and the statutes of limitation of ten and twenty years; and issue was joined on these pleas. On the trial, as the bill of exceptions recites, "the plaintiff having demanded a

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72	541
97	578
97	593
97	600

72	541
98	187

72	541
100	409
102	299

72	541
109	47
110	478

72	541
140	297
72	541
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struck jury, the clerk thereupon delivered to the counsel of the plaintiff, and to the counsel of the defendant, a list of each panel of the jurors, there being twelve jurors on each panel at the time. The plaintiff's counsel moved the court to exclude two of the jurors from the panel, on the ground that they had been members of the jury at a previous term to which this cause was submitted for trial, when there was a mistrial; and this objection was admitted by the defendants to be true. The plaintiff moved the court to exclude said two jurors from the panel, and to have their places supplied by qualified jurors; which motion the court overruled, and the plaintiff excepted. The defendants struck one of said jurors from the panel, and the other served on the trial."

The plaintiff proved his possession of the land in 1844, or 1845, and the payment of rent to him, for several years, by persons who were digging for gold on the land, or cultivating small detached portions; and his purchase of the land, in 1870, at an administrator's sale. A witness for the plaintiff testified, that before Denson built a house on the land, in 1851, or 1852, he asked and obtained plaintiff's permission to build; and that he, witness, then a slave, was sent by plaintiff to assist in putting up the house. Other witnesses for plaintiff testified to declarations made by Denson, at various times during the years 1863-4, 1869, and 1873, disclaiming title in himself, and acknowledging that he held under plaintiff. Said Denson, testifying as a witness for defendants, denied that he had ever asked plaintiff's permission to build, or had ever held under him, or acknowledged his title in any way; and he claimed to have bought the land, by verbal contract, from one Curran Pettitt. D. V. Crider, a witness for defendants, "testified that, from the time Philip Denson built on the land, he mined on all the lands sued for, up to the time he cleared and inclosed them for farming purposes; and that in 1844, prior to said Denson's purchase from Pettitt, hereinafter mentioned, one Putnam lived on said west half, and had a cabin and a cleared patch on it. Defendants proposed to prove by said witness, that said Putnam, at said time above named, sold his interest in said west half to Curran Pettitt, for a wagon and steers; that the sale was verbal, there being no writings, and the parties being at the time in the road at Arbacoochie." The plaintiff objected to the admission of this testimony, "on the ground that it was illegal and irrelevant, and because the said sale was not in writing." The court overruled the objection, and allowed the testimony to go to the jury "as evidence under the statute of limitations;" and plaintiff excepted. The bill of exceptions further states in this connection: "There was no evidence that Putnam then and there, or at any other time, put said

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Pettitt in actual possession of his interest in said land. Pettitt said to Putnam, '*Here are your steers and wagon, for your interest in the west half of six;*' and he said, '*It is all right;*' and this was all of it that the witness testified to in regard to said sale." Several witnesses for the defendants were allowed to testify, against the objections of the plaintiff, to the declarations of said Denson, while living on the land, "that he had bought said land from Curran Pettitt, and paid him a valuable consideration therefor;" and to the admission of these declarations as evidence exceptions were duly reserved by the plaintiff.

The court refused six charges in writing asked by the plaintiff, and gave eighteen charges asked by the defendants. The opinion of the court renders it unnecessary to set out these charges at length, as the principles enunciated can be understood without them. The refusal of the charges asked, the charges given and excepted to, and the other rulings to which exceptions were reserved as above stated, are now assigned as error.

JNO. T. HEFLIN, and AIKEN & MARTIN, for appellants.

SMITH & SMITH, *contra*.

BRICKELL, C. J.—The present statute, in regulation of the right of parties to civil causes to demand a struck jury (Code of 1876, § 3018), is not materially variant from the former statute (Clay's Dig. 459, § 52). When the right is demanded, neither party,—whether it is the party making the demand, or his adversary,—is to be subjected to the hazard of being compelled to submit the issue to the verdict of jurors who may be of the regular panels in attendance upon the court, and yet subject to challenge because of bias or interest as to the particular case.—*Davis v. Hunter*, 7 Ala. 135. The right of the parties to a jury free from bias or interest is not lost, nor subjected to chance or peril, because one party, in the exercise of a legal right—exercised, it is presumed, that an impartial jury may be secured—demands a struck jury. Jurors who were members of a former jury, to whom the cause had been submitted, discharged, and a mistrial had, because the jury could not agree, are not competent jurors upon a subsequent trial of the cause; they are not impartial—free from the bias of formed opinions.—*Smith v. State*, 55 Ala. 1. The Circuit Court erred, in not excluding from the panel the two jurors to whom objection was made.

2. *Prima facie*, the sale of the lands by Putnam to Pettitt was irrelevant. If evidence of the sale had been offered, in connection with evidence that Pettitt subsequently sold to Den-

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son, and that he entered, claiming possession and title from the sale, the evidence would have been relevant. That there was no written evidence of sale, would not have been material. A claim of title, rendering a possession adverse, may rest upon a sale of which there is no written evidence. The writing may be essential, to render the title valid; but it is not the validity of the title claimed, which is an element of adverse possession. The claim, and intention to claim title and possession, however the title may be derived, distinguishes the possession from that of a mere trespasser. But the evidence, not having been offered in connection with evidence of this character, and no such evidence having been subsequently adduced, was improperly admitted.—*Mardis v. Shackelford*, 4 Ala. 493; *Bates v. Terrell*, 7 Ala. 129.

3. The declarations of Denson, that he bought the land from Pettitt, and of the price he paid, were inadmissible. The declarations of a party in possession of property, real or personal, explanatory of the possession, are received in evidence on the principle of *res gestæ*.—1 Brick Dig 843, §§ 558–59. But his declarations merely narrative of past transactions, or respecting the source of the title, or the contract by which possession was acquired, are inadmissible.—*Ib.* 843, § 560.

4. The principal point of contention in the Circuit Court was directed to the character of the possession of the premises by one of the defendants. It seems not to have been disputed, that the possession had been continued for a period of time which barred the true owner of the right of entry, and would be protected by the statute of limitations, if it was adverse. Numerous instructions were given and refused upon this point, which are now assigned as error. It would not serve any useful purpose to consider them separately. There are a few general principles governing this question, illustrated by repeated decisions of this court, which were not observed in the giving and refusal of several of these instructions, and observance of which, upon another trial, will lead to a just determination of the cause.

The mere possession of land is not *prima facie* adverse to the title of the true owner. All presumptions and intendments are favorable to the title, and possessions are not presumed to be hostile, but rather in subordination to it. As to an intruder, or trespasser, or as to one who does not show a better right, possession of lands, like the possession of personal property, is *prima facie* evidence of title, and will support ejectment. But, though this presumption attaches to the possession—that it is an occupancy by right—the presumption disappears in the presence of the title. When the title is shown not to attend the possession, but that it resides in another, the law, not favoring

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wrong, will not presume that the possession was taken, or is held and claimed, in hostility to the title. The burden of proving the possession adverse—that it was taken and held under a claim of title hostile to the title of the true owner—rests upon the party asserting it.—*Brown v. Cockrell*, 33 Ala. 38; *Herbert v. Hanrick*, 16 Ala. 581; Ang. Lim. § 385; 2 Smith's Lead. Cases, 642.

A material inquiry in this cause—one the jury will not fail readily to solve, under proper instructions—is, whether the defendant, Denson, entered upon the lands in good faith, claiming title to them; and whether the possession and claim was continuous and uninterrupted, for the period of ten years before the commencement of this suit. We say *in good faith, claiming title*; but we must not be understood as saying, that the inquiry as to good faith in claiming title involves an inquiry into his belief in the strength of his title, or that he had any title. It is good faith in claiming possession and title—the real intention to claim the possession as his own, distinct from, and hostile to, the title of the true owner. If that was not his real intention, there is an absence of an indispensable element of adverse possession. The true owner, it may be, during any period of the possession, could have resorted to legal remedies, and ejected him. But he was not bound to resort to such remedies—it rested in his election, whether he would treat the possession taken without claim of right, and not in hostility to his title, as an ouster or disseisin, or as dependent upon his pleasure for its continuance.—Ang. Lim. § 387; *Farmer v. Eslava*, 11 Ala. 1028; *Ormond v. Martin*, 37 Ala. 598; *Manly v. Turnipseed*, 37 Ala. 522.

6. The whole doctrine of adverse possession rests upon the presumed acquiescence of the party immediately affected by such possession. Therefore it is, when possession of property is originally held and acquired in subordination to the title of the true owner, to constitute the continued possession adverse, there must be a disclaimer of the title of him from whom the possession was acquired, and an actual hostile possession of which he has notice, or which is so open and notorious as to raise a presumption of notice.—*Lucas v. Daniels*, 34 Ala. 188; *Shelton v. Eslava*, 6 Ala. 230; *Alexander v. Wheeler*, 69 Ala. 332; *Johnson v. Collins*, 57 Ala. 304. If Denson originally entered upon, and acquired the possession of the lands, by the permission of Dothard, he entered in subserviency to his title. Unless he has subsequently, and continuously for the period of ten years, openly disclaimed and disavowed the title of Dothard, asserting an adverse right and title in himself, of which notice is brought home to Dothard, there is no foundation for

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the operation of the statute of limitations.—*Zeller v. Eckert*, 4 How. 289.

If, during the period of the possession, Denson declared that the lands were Dothard's, or that he was holding under Dothard, or by his consent, the possession was permissive, not adverse. Nor will a continued possession after such declarations avail to mature a title under the statute of limitations, unless Denson changed the character of his possession by disavowal and disclaimer, or by the exercise of acts of ownership inconsistent with a possession in subordination to the title, of which Dothard had notice.—Ang. Lim. § 384. And the declarations of Denson while in possession, that he had no title, or that he did not claim title, whether his possession was or not by permission of Dothard, are evidence that his possession was not adverse, capable of maturing into title under the statute of limitations.—2 Smith's Lead. Cases, 642.

The rulings of the Circuit Court were inconsistent with these views, and its judgment must be reversed, and the cause remanded.

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1. *Map, or diagram; when admissible as evidence.*—A surveyor, or expert, testifying as to the form, configuration, or dimensions of the land in controversy, may introduce a map or diagram, made by himself, to aid in making his testimony intelligible; and such map or diagram may then be submitted to the jury, to aid them in understanding or remembering his testimony. But such map or diagram is not *prima facie* or presumptively correct, unless prepared by a county surveyor, after notice to the party in adverse interest, as provided by the statute (Code, § 868); and not having been so prepared, but made by the witness without having the title-papers before him, and admitted by him, on examination of the deeds, to be incorrect, it should not be allowed to go to the jury for any purpose.

2. *Description of lands in sheriff's deed.*—A sheriff's deed for land sold under execution, described as "part of lot number seventy (70), fronting on Gallatin street fifty (50) feet, and extending eastwardly seventy-three (73) feet," though too indefinite to authorize a recovery, is not void on its face for uncertainty; but, the lot sold being further described as "the property of Isaac Jemison & Co.," and the dimensions of lot seventy (70) being shown, extrinsic evidence would be admissible to show that Jemison & Co. only owned a part of said lot corresponding with the dimensions given in the deed, and to identify that portion.

3. *Adverse possession, and color of title under deed.*—When a vendor conveys by deed lands particularly designated, or described by numbers, metes and bounds, the purchaser acquires title, or color of title, only to

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72	546
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the lands within the designated numbers and boundaries; and if he claims adverse possession, under color of title, of adjoining lands outside of those numbers and boundaries, because his vendor was in possession thereof at the time his conveyance was executed, he must show that the possession thereof was delivered to him, as a part of the lands sold and conveyed; otherwise, he can not tack his vendor's prior possession to his own subsequent possession, for the purpose of making out a title under the statute of limitations.

4. *Effect of adverse possession on conveyance.*—To avoid a conveyance of lands made by one who is out of possession, on the ground of adverse possession in another, it is not necessary that the adverse possessor should have color of title, nor is it sufficient to show only the exercise of acts of ownership by him: to avoid the conveyance, he must be in adverse possession, "exercising acts of ownership, and claiming to be rightfully in possession."

5. *Proof and effect of acts of ownership.*—On the question of adverse holding, or of asserted claim of right, acts of ownership are legal evidence to go before the jury; but they are not the equivalent of a claim of right, which is a conclusion of fact to be drawn by the jury from all the evidence, under appropriate instructions.

6. *Judicial sales; not affected by maintenance, or adverse possession.*—A judicial sale—that is, a sale made by a public officer, under legal process—is not within the doctrine against maintenance, and its validity is not affected by the fact that the land is at the time in the possession of a third person, claiming adversely to the defendant in the process.

7. *Claim for valuable improvements, and liability for rent.*—When the defendant suggests on the record adverse possession for three years before the commencement of the suit, and the erection of valuable improvements, the statute makes provision for the manner in which, if the suggestion is found true, the value of the improvements and of the use and occupation of the land shall be set off against each other (Code, §§ 2951-54); but, he is not entitled to compensation for such improvements, unless they were erected under "the bona fide belief that the property was his;" and if the jury find that he erected them "in the mistaken but honest belief that the land was covered by his deed, but with no intention of claiming the lot if not embraced in his deed, then he will be entitled to the value of his improvements, but must answer for rents during the time they were being put up."

8. *Construction and operation of deed; questions for court and jury.* The construction of a deed is always a question for the court; but, when its construction and operation, as to the limits and boundaries of the lands conveyed, depend upon extrinsic parol evidence, its construction and effect should be stated to the jury hypothetically, so that they may pass upon the facts.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. H. C. SPEAKE.

This action was brought by Mrs. E. C. Humes and others, against Morris Bernstein; and was commenced on the 11th July, 1871. The premises sued for were thus described in the complaint: "Part of lot number seventeen in the original plan of said city [Huntsville], fronting on Gallatin street, commencing on said street ninety-nine feet from the north-west corner of said lot number seventeen, and running thence southwardly, along said street, thirty-eight and one-half feet; thence eastwardly, and at right angles with said street, one hundred and

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sixteen and one-half feet; thence northwestwardly, on a line parallel with said street, thirty-eight and one-half feet; thence westwardly, at right angles with said street, to the beginning;" and another narrow strip of land, two feet wide, by ninety-nine feet in depth, which fronted Clinton street on the north, and run back in the rear to the lot first described. This narrow strip requires no particular notice, as the controversy, on each trial, seems to have been confined to the larger lot. The defendant pleaded—1st, "that he is not guilty of unlawfully withholding the premises claimed by plaintiffs;" 2d, "the statute of limitations of ten years;" 3d, "that defendant, and those through whom he claims, have had and held actual adverse possession of the premises sued for, under claim of title, for more than fifteen years before the commencement of this suit;" and, 4th, "defendant suggests that he, and those whose possession he has, for three years next before the commencement of this suit, have had adverse possession of the premises sued for, and have made valuable improvements thereon." Issue was joined on all of these pleas.

The square, or block, in which the premises sued for are situated, was bounded north by Clinton street, east by Jefferson street, south by Randolph, and west by Gallatin street; and it was subdivided, according to the original map of the city, into four lots of equal size, numbered 17, 18, 25, and 26, each of which measured 147 feet, 6 inches, in width, and the same in length. Lot No. 17 was the north-west fourth of the square, and the defendant claimed and had possession of the greater part, if not the whole of it; while the plaintiffs owned the residue of the square, and adjoined his premises on the east and south. The plaintiffs claimed the premises as a part of the property which once belonged to the old "Bell Tavern," and afterwards to the "Huntsville Hotel Company;" deducing title under a deed from the United States marshal to L. P. Walker, as the purchaser at a sale under execution against said hotel company, and a subsequent deed by Walker to said plaintiffs. The marshal's deed to Walker was dated February 7th, 1870, and described the property sold as "lots number seventeen, eighteen, twenty-five and twenty-six," bounded by the four streets surrounding the square, and "known as the Huntsville Hotel Company's property;" and Walker's deed to plaintiffs, which was dated May 22d, 1871, contained the same description.

The defendant bought his property from R. W. Chappell, and received a conveyance dated December 21st, 1861, in which the premises conveyed were thus described: "Parts of lot numbered seventeen in the plan of said town, commencing at the north-west corner of a little brick house on Gallatin street,

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and running thence eastwardly, at right angles with said street, and parallel with Clinton street, seventy-four and a half feet, to a stake; thence, at right angles to Clinton street; thence west, to the north-west corner of said lot; thence, south, along Gallatin street, to the beginning, being about sixty-seven feet, and containing not quite one-eighth of an acre. Also, another lot of land in said town, being part of said lot seventeen, lying east of the above described lot, known as the lot on which John G. Bingham once lived, and once owned by Isaac Jemison; sold as his property to Benjamin Patterson, by John F. Mills as sheriff; by Patterson sold to D. B. Turner, and by D. B. Turner to Lucy G. Hill; bounded on the east and south by the *Bell Tavern* lot. Also, another lot of land, being part of said lot number seventeen, bounded on the north by the lot first above described, on the east by the lot last above described, on the south by the *Bell Tavern* lot, and on the west by Gallatin street; supposed to front on said street about twenty-five feet, and to run back east about seventy-four feet." This description was taken from the deed which Chappell had received from his vendors, Josiah Battle and others, which was dated December 20th, 1861, and which contained covenants of warranty as to the two lots first described, but, as to the last lot, conveyed only such title as they had received in their conveyance from Lucy G. Hill, "be it good or bad;" and Mrs. Hill's deed to said Josiah Battle and others, dated April 9th, 1858, contained the same description.

The plaintiffs deraigned title as follows: Patent from the United States to Leroy Pope, granted in 1809; deed from Pope to Cannon, dated August 29th, 1816, for said lot seventeen; deed from Cannon to Price, dated December 28th, 1818, for the same lot; deed from Price to Stokes, November 23d, 1822, for the same lot, "with the reserve of twenty-five feet, fronting on Gallatin street, *where the brick house stands*, running back seventy-four feet nine inches, at right angles;" deed of Stokes to Rogers, February 4th, 1823, for the same property, and with the same reservation; deed of Rogers to Isaac Jemison, January 31st, 1826, for the same lot, and with same reservation; deed of Acklen, as sheriff, to Elliott, April 2d, 1832, for "*part of number seventeen, fronting Gallatin street fifty feet, extending eastwardly seventy-three feet, sold as the property of said Isaac Jemison & Co.*"; Elliott to Sadler, March 4th, 1833, "all that certain piece or parcel of ground in said town of Huntsville, known as part of lot seventeen in the plan of said town, fronting on Gallatin street about fifty feet, and extending eastwardly seventy-three feet;" Sadler to Horton, April 7th, 1834, "all that certain lot [part?] of No. 17, fronting on Gallatin street fifty feet, and extending eastwardly seventy-three feet,

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known as the lot formerly owned by Isaac Jemison;" Horton and Robinson to Caldwell, August 18th, 1838, for the same lot, described in the same words, with lots twenty-five and twenty-six, and two other lots thus described: "also, two lots conveyed by Daniel B. Turner and Benjamin T. Moore, as trustees, to Wm. E. Phillips, and therein described as follows: one, the lot purchased by the said Phillips of William McCay, on which is situated the new brick building; the other, the lot bought by said Phillips of D. B. Turner, in rear of the same, on which is erected a frame stable." In the subsequent deeds, down to the conveyance to the Huntsville Hotel Company, which was dated April 16th, 1857, all the property is conveyed by the same words of description, or words substantially the same; each including "part of lot number seventeen, fronting on Gallatin street fifty feet, and extending eastwardly seventy-three feet, known as the lot formerly owned by Isaac Jemison."

The plaintiffs introduced in evidence, also, the following deeds: (1.) "Deed of Jemison and wife to A. Rison, dated July 15th, 1826, conveying 'all that certain parcel of land,' &c., 'known as the part of lot No. 17, in the plan of said town, meted and bounded as follows: beginning on Gallatin street, *at the north-west corner of a little brick house situate* on said lot, and now occupied by James Hood, the tailor; running thence eastwardly, seventy-four and one-half feet, parallel with Clinton street, to a stake on the western boundary of a piece of land said Jemison had previously sold to one John G. Bingham; thence northwardly, about sixty-seven feet, to Clinton street; thence westwardly, with said street, to the north-west corner of said lot No. 17, seventy-four and a half feet; thence southwardly, about sixty-seven feet, with Gallatin street, to the place of beginning, containing not quite one-eighth of an acre, more or less." (2.) "Deed of A. Rison to John R. Elliott, dated March 4th, 1833," conveying the same lot, by the same descriptive words. (3.) "Deed of Isaac Jemison and wife to John G. Bingham, dated June 15th, 1827, conveying all that certain lot, or parcel of ground," &c., "known as part of lot No. 17, fronting on Clinton street, containing forty feet in front, adjoining the lot of A. Rison on the west, and running south, with his line, to an alley extending from Gallatin street up the rear line of said lots; thence up said alley until it intersects the boundary line of the lot now owned by D. B. Turner, being also part of said lot No. 17, and thence northwardly, with his line, to the front on Clinton street," with the alley seven feet wide. (4.) "Deed of D. B. Turner, as sheriff, to Wm. E. Phillips, dated April 5th, 1836, conveying one lot, or parcel of ground, in said town of Huntsville, upon Clinton street, say front thirty-three feet, more or less, and running back to the

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lot known as the *Bell Tavern* lot south, and adjoining the lot of John G. Bingham on the west, sold as the property of Isaac Jemison." (5.) "Deed of Turner and Moore, as trustees of Phillips, to John M. Caldwell, dated April 11th, 1836, conveying 'all that parcel of ground in Huntsville, on which is situated the *Bell Tavern* and appurtenances, and the new brick building contiguous thereto, erected on a lot bought of Wm. McCay; also, lot bought of D. B. Turner, in rear of the same, on which is erected a new frame stable."

"For the purpose of locating and identifying the Jemison fifty-foot lot on Gallatin street, the plaintiffs then introduced the following deeds, which were afterwards introduced by the defendant, as evidence relied on by him in deraignment of his title:" (1.) "Deed of Patterson to Turner, dated August 9th, 1842, conveying lot known and described as being part of lot No. 17 in the plan of said town; being the same on which John G. Bingham and his family formerly resided, and which was formerly owned by Isaac Jemison; being the same conveyed by John F. Mills, formerly sheriff of said county, to said B. Patterson, by deed dated April 8th, 1830." (2.) "Deed of D. B. Turner to Hill, dated December 19th, 1846," conveying the same lot, by the same descriptive words. Also, Mrs. Hill's deed to Battle, Battle's deed to Chappell, and Chappell's deed to defendant, above described. These were all the conveyances introduced by either party.

The *little brick house*, mentioned in several of the deeds, was torn down prior to 1860, and the dividing fences were all destroyed during the war. Several witnesses, who had resided in Huntsville for many years, were examined orally as to the location of the little brick house, and the identity of its site with that of a house built by one Gurley, in 1867, as the tenant of defendant, and their testimony differed in material respects; some of them stating that Gurley's house was on the ground where the brick house stood, and others that it stood south of an alley which separated Mrs. Hill's property from the property of the *Bell Tavern*, and at the place used by Mrs. Kinkle as a cow-lot while she kept the tavern. R. W. Coltart, a witness for the plaintiffs, testified, "that he knew the brick-house lot; that Mrs. Hill consulted him about buying it at tax-sale, and he advised her against it; that she then extended her fences so as to include it, and continued to use it until she sold it in 1858." Britton Franks, another witness for plaintiffs, testified: "Mrs. Hill's lot did not embrace the little brick-house lot, but she fenced it in. Don't know whether she included the alley or not. The house the defendant has put up lies south of the Hill property." Z. P. Davis, a witness for defendant, who was the proprietor of the *Bell Tavern* from 1851 to 1856, testified

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that he had always considered the hotel property as extending to Mrs. Hill's fence, and that Gurley's house was north of where that fence stood, according to his recollection. M. W. Steele, a witness for the defendant, who was a surveyor and civil engineer, and had been a stockholder and director of the Huntsville Hotel Company, testified that, in 1867, he was appointed by the directors of the company to make a map of the lots, and made a map, which he produced, and which gave the defendant 137 feet, 6 inches, front on Gallatin street, and included the lot where Gurley's house was then standing, giving the hotel property a front of 160 feet on that street; and that, in the preparation of this map, he did not make any examination or comparison of the deeds, but ran the line where the defendant had erected his fence south of Gurley's house. On cross-examination, the plaintiffs' several deeds being exhibited to him and compared, he further testified "that, as an expert, his conclusion was that they gave plaintiffs fifty feet more front on Gallatin street than said map allowed them; that said fifty-foot lot could be identified, and it belonged to said hotel company when said map was made in 1867; and that said map is incorrect, and does not represent the true ownership of said fifty-foot lot on Gallatin street." On this evidence, the plaintiffs objected to the admission of the map as evidence, "because it was incorrect, and was incompetent and illegal as evidence, and was calculated to mislead the jury;" and they duly excepted to the overruling of their objections.

The defendant thus testified, as a witness for himself: "That the only portion of lot No. 17 to which he ever asserted or had in fact any claim, right or title, was that included in the deed made to him by Chappell in 1861; that the fences south of the property included in his said deed were destroyed during the war; that he leased the lot south of any property described in his said deed, in 1865, to Jacob Gurley,—the terms of the contract being that Gurley was to put a house on it, and to keep up the fences around it, and in consideration thereof was to occupy the house three years; that Gurley accordingly took possession of said lot, inclosed it, and put up the house that now stands on it; that Gurley was in the occupancy of said house under this arrangement, and was paying him rent for it, at the time of the deed from the United States marshal to Walker, and at the time of the deed from said Walker to plaintiffs; and that the only improvements made upon the lot in controversy were the said house and fences erected under the arrangement and circumstances above stated."

R. Chapman, witness for plaintiffs, testified, "that the rental value of the property sued for is ten dollars per month, payable monthly; and that the only improvements made upon the prop-

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erty were placed there by Jacob Gurley, under a written contract between him and defendant, by which said Gurley was to build the house, and to have the use of it for three years, in consideration of having built and placed the house there."

This was all the evidence adduced, as to the value of the improvements, and of the rents, or use and occupation; and all the evidence as to the character of the defendant's possession.

On all the evidence adduced, the substance of which is above set out, the court charged the jury, on the request of the defendant, as follows: (1.) "If the jury find, from the evidence, that at the time the United States marshal conveyed to Walker, and Walker conveyed to plaintiffs, Bernstein was in the actual possession of the lot sued for, by himself or tenant, claiming it as his property, the question of title has nothing to do with the case, and they must find for the defendant." (2.) "If the jury find, from the evidence, that Bernstein was in possession of the lot sued for, by himself or tenant, exercising acts of ownership over it, at the time the marshal conveyed to plaintiffs; the deed of Walker is void as to Bernstein, and their verdict must be for the defendant, regardless of the question of title." (3.) "If the evidence shows that, at the time Walker conveyed the lot in dispute to plaintiffs, Bernstein was in possession, by himself or tenant, exercising acts of ownership over it; Walker's deed to plaintiffs is void as to Bernstein, and their verdict must be for the defendant." (4.) "The jury must assess the value of the improvements from the evidence in the case, and it is immaterial whether they were put there by Bernstein or his tenant." (5.) "The jury must find the value of the rent of the property from the evidence in the case; and if there is no evidence as to what the value of the rent is, without the improvements, then they can not return a verdict for any rent."

The plaintiffs duly excepted to each of these charges, and they now assign each of them as error, together with the admission of the map as evidence.

HUMES, GORDON & SHEFFEY, and L. P. WALKER, for the appellants.

BRANDON & JONES, *contra*.

STONE, J.—In speaking of the form, configuration, and dimensions of real estate, when in controversy, a witness who is a surveyor, or expert, may introduce a map, or diagram, to aid him in making himself understood; and when this is done, the map or diagram may be submitted to the jury, as an aid to that body in understanding or remembering the witness' testi-

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mony.—*Bridges v. McClendon*, 56 Ala. 327, and authorities cited. But such map, unless prepared according to section 868 of the Code of 1876, is only testimony to be weighed by the jury. It does not rise to the dignity of *prima facie* proof. Steele, who prepared the map, testified that he made it without having any title-papers before him, and, hence, without having the means of knowing whether or not it was correct. He further testified, on an examination of the two chains of title, that the map was not correct; and he gave the reasons why it was not correct. It, therefore, could not aid the jury in understanding and remembering his testimony, and it should not have been allowed to go to the jury. Its tendency was to confuse, rather than to enlighten that body.

This cause has been twice before in this court.—*Bernstein v. Humes*, 60 Ala. 582; *same v. same*, 71 Ala. 260. The testimony in the several trials has not been the same. The plaintiffs' title has been heretofore made to rest primarily on the deed of Acklen, sheriff, to Elliott, made in 1832. It is substantially undisputed, that, from 1826 to that time, Jemison was the owner of the property in dispute. Acklen's deed to Elliott describes the property conveyed as "part of lot number seventeen, fronting Gallatin street fifty feet, extending eastwardly seventy-three feet, sold as the property of said Isaac Jemison & Co." This property, with description corresponding substantially with that given in Acklen's deed, is conveyed in several mesne conveyances from Elliott down, until it became incorporated into the Bell Tavern property. We do not propose to repeat here what we said there, showing the various mesne conveyances. We refer to the report of second hearing of this case (71 Ala. 260), for a full statement. The contention of appellee is, that this deed is void for uncertainty in the description of the property intended to be conveyed. Without extrinsic aid, the dimensions of lot seventeen being given, it certainly is too indefinite. But, in construing written instruments, it is permissible to prove, not the unwritten intention of the parties, but the attendant facts and circumstances—the condition of the property, and of the parties at the time—as aids in the interpretation. In other words, you may put yourselves in the place of the contracting parties, and draw from that stand-point any legitimate inferences or conclusions (not conjectures) of fact, which tend to shed light on the intention of the parties.—*Chambers v. Ringstaff*, 69 Ala. 140; *Tennessee & Coosa R. R. Co. v. East Alabama Railway Co.*, at present term. Replying to the argument that the deed is void for uncertainty, we said, when this case was last here: "This can hardly be affirmed as matter of law, on the face of the deeds. We can not judicially know the extent of that lot's front on

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Gallatin street. Its entire front on that street, looking alone to the deed, may have been only fifty feet; or, it may be that Jemison at that time owned a defined part of the lot fronting on Gallatin street, measuring fifty feet, and known as the property of said Isaac Jemison." So, we in effect ruled, that the deed was not necessarily void for uncertainty; but that, if certain supposed proof was made, and certain facts shown, the property might be identified, and the deed would thus become operative. One phase of the testimony, in the present record, tends to show that before Sheriff Acklen conveyed to Elliott, Jemison had disposed of his entire front of lot seventeen on Gallatin street, except the part in controversy, which it is contended lies south of the seven-feet alley.

In our last consideration of this case, we showed that the deed from Battle to Chappell, and from the latter to Bernstein, apparently called for only about ninety-two feet front on Gallatin street, and bounded the premises south on the Bell Tavern property. It followed, as we then said, if the property in controversy lay south of that line, Bernstein, by virtue of his deed from Chappell, did not appear to have either title or color of title to it. Bernstein's title accrued in 1861, and we suppose he had no possession before that time. In fact, it is not shown that he took any possession of the property in dispute until he let the premises to Gurley in 1865. The present suit was commenced in 1871, much less than ten years from the time he put Gurley in possession; and, deducting the period of the war, much less than ten years from the time he purchased from Chappell. Now, if this be the *situs* of the disputed lot, whether Mrs. Hill, or any precedent owner to Bernstein, occupied the premises or not, neither Chappell nor Bernstein purchased such possessory right or claim; for the deeds do not embrace it. Nor is there proof, even if Mrs. Hill occupied the premises as a cow-lot, that that occupation or possession was kept up continuously, until Bernstein took possession through Gurley. Bernstein shows no right, by the testimony in this record, to tack his possession to that of Mrs. Hill, beyond the land covered by his deed. It follows that, when this suit was brought, in 1871, Bernstein had no possession which could operate a statutory bar, against any one's lawful right of entry, of any lands which lay outside of the boundaries given in his deed.

The remaining question arises on the asserted adverse holding by Bernstein, when Walker conveyed to the children of Mrs. Chapman. When this case was first in this court—60 Ala. 582—speaking of the infirmity of a title acquired by purchase while the property was adversely held by another, we said, as the result of our rulings, that to defeat the operation of a conveyance thus made, it was sufficient that another "is

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in possession, asserts the right to retain the possession, and that his claim is adverse to that of plaintiff's grantor." And when the case was last here—71 Ala. 260—we said: "To avoid a deed made by one out of possession, it is enough if there be one in adverse possession, exercising acts of ownership, and claiming to be rightfully in possession. Color of title is not necessary." The effect of these rulings was, and is, that it is not enough to avoid a conveyance of property that it is in the possession of another, who is exercising acts of ownership over it. Acts of ownership, such as clearing land, erecting houses, &c., are not necessarily claim of ownership, or of right. These may be done by a tenant, as they appear to have been done by Gurley, without any claim of right. Or, they may be the acts of a mere trespasser or adventurer, without claim of right. Or, they may be the result of a mistaken belief that the true line embraces the land on which the improvement is made, but with no intention of claiming if not within the area covered by the title. In either case supposed, unless the possession is held with the intention of claiming the property, without regard to the title, or true dividing line, such possession or holding is not adverse, and will neither ripen into a title by lapse of time, nor defeat the operation of a conveyance by the rightful owner. *Brown v. Cockrell*, 33 Ala. 38; *Alexander v. Wheeler*, 69 Ala. 332. It follows, that while acts, such as are usually done or performed only by the owner, or one asserting ownership, are legal evidence to go before the jury on the question of adverse holding, or of asserted claim of right, they are still only evidence to be weighed with the other evidence. They are not the equivalent of a claim of right. The latter is a conclusion of fact, to be found, or not found, by the jury; the former is only testimony tending to prove such fact. But such acts need not be done by the party himself. He may have them done by an agent or tenant; and if done for him, they have the same effect in law, as if done by him.

In the charges given and excepted to are the following errors: Charge 1 is faulty in this, that the rule against maintenance does not apply, when the sale is what is called a judicial sale, or is made by a public officer, under legal process. Charges 2 and 3 omit all mention of claim of right, as a necessary ingredient in the adverse holding which would avoid Walker's conveyance to the plaintiffs. Under the evidence, that qualifying clause should have been inserted in these charges.

If the defendant placed, or had placed, the improvements on the premises, in the *bona fide* belief that the property was his, then his claim for improvements should be entertained under sections 2951 *et seq.*, Code of 1876.—*N. O. & S. R. R.*

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Co. v. Jones, 68 Ala. 48. Charge 4 is faulty, in that it pretermits the question of *bona fides*. The case cited will furnish a sufficient guide on another trial.

It is not deemed necessary to comment on section 2966 of the Code. If the land in controversy is not embraced in the terms of Bernstein's title, then he had no color of title, and the statute does not apply to him. If it is embraced in his deed, then it would seem he was in adverse possession under claim of right, and plaintiffs must fail on that ground, if for no other reason.

We have several times spoken of plaintiffs' claim contingently. We do not thereby intend to say, that the construction of the deed is a question for the jury. They must judge of, and determine the concomitant facts, which are aids in interpreting the instrument; but the court must construe the instrument. This is done by a hypothetical charge, stating the result, if certain facts are found to be proved. The jury passes on the parol testimony, and determines what facts are proved. The court must determine what influence such facts, if found to exist, must exert, in interpreting the writing. The court thus interprets the writing, aided by the surrounding facts which the jury find to be proven. We, in *Chambers v. Ringstaff*, *supra*, laid down the true rule. We have spoken of it contingently, for another reason. It seems to be undisputed that Bernstein's deed—the quit-claim clause of it—conveys the lot on which the little brick house once stood. Some of the testimony in the record tends to show that the lot in controversy in this suit is the lot on which that house stood. Other witnesses testify differently. It is not for us to determine the weight of the evidence. The jury must decide that, under proper instructions.

The last charge given, numbered five, is also erroneous. If, under the rules declared above, the plaintiffs are entitled to recover, they are entitled to rents, at least to the extent Bernstein has realized them; and if, under the testimony, the jury find that Bernstein had the improvements made, in the mistaken, though honest belief, that the land was covered by his deed—but with no intention of claiming the lot if not embraced in his deed—then he will be entitled to the value of his improvements, but must answer for rents during the time they were being put up. The law does not contemplate that a mere trespasser, though innocently, on another's land, shall make any profit thereby.

The last paragraph above relates alone to the question of rents, in the event plaintiffs are entitled to recover under the rules above laid down. The *onus* rests on them, first, to show such right, as we have intimated above it may be shown. This,

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if done, will shift the *onus* to the defendant, to make good one line of his defense; either that his deed embraces the disputed ground—in other words, that the little brick house stood on the lot sued for; or, that when Walker conveyed to the Chapman heirs, he, Bernstein, was in adverse possession under claim of right as we have explained that phrase.

Reversed and remanded.

BRICKELL, C. J., not sitting.

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Indictment for Renting or Allowing Room to be used for Gaming Purposes.

1. *Allowing room to be used for gaming purposes; who is "owner or proprietor."*—Under the statute which makes it a penal offense for any person, "being the owner or proprietor of any house, room," &c., to rent or lease the same for gaming purposes, or knowingly to permit the same to be used for any such purpose (Code, § 4214), a conviction may be had against a person who has possession as a tenant or lessee.

FROM the County Court of Madison.

Tried before the Hon. WILLIAM RICHARDSON.

H. C. TOMPKINS, Attorney-General, for the State, cited *Pierce v. Concord Railroad Co.*, 51 N. H. 590; *Hall v. Brown*, 54 N. H. 495; *Lister v. Lobley*, 6 Nev. & Man. 340.

SOMERVILLE, J.—The defendant is indicted, under section 4214 of the Code (1876), for knowingly permitting a room, which he had leased as tenant of one Steele, to be used for gaming purposes. The question is, whether, being a mere lessee, he may be regarded as "the owner or proprietor" of such room, within the meaning of the statute. We are clearly of the opinion that he can be. The words "owner or proprietor" have no technical, legal signification, but are merely words of common parlance. They include any one having a beneficial interest, whether such interest be entire or partial. As said by Lord DENMAN, C. J., in *Lister v. Lobley*, 6 Nev. & Man. 342, "the owner of the fee, and the owner of a term in the land, are each of them an owner of the land." The word "proprietor" is of larger signification than "owner," and was evidently added so as to embrace any one in control, receiving beneficial

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returns from the class of tenements described in the statute. The two words, "owner or proprietor," have been frequently decided to include a lessee or tenant, in construing various statutes in which they occur.—*Lister v. Lobley*, 6 Nev. & Man. 342; *Ib.*, 7 Adol. & El. 124; *Hall v. Brown*, 54 N. H. 495; *Pierce v. Concord Railroad*, 51 N. H. 590.

The defendant was properly convicted under the rulings of the court, and the judgment is affirmed.

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Statutory Rehearing, after Final Judgment at Law; Motion to dismiss Appeal.

1. *When appeal lies; and when mandamus.*—According to the settled practice of this court, an appeal lies from an order refusing to grant a statutory rehearing after final judgment at law (Code, §§ 3160-68), because such refusal is a final judgment; but, if a rehearing is improperly granted, the remedy for the correction of the error, before final judgment in the case, is by *mandamus*, and an appeal does not lie.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. H. C. SPEAKE.

The record in this case shows that, on the 12th June, 1879, an action was instituted in said Circuit Court, by summons and complaint, in the name of Emmett O'Neal, "as administrator of John Harkins, and assignee of George W. Karsner," against Fleming J. Kelly; that a judgment by *nil dicit* was rendered in said cause, on the 27th August, 1881, which recites that the defendant appeared and withdrew his pleas; that on the 9th November, 1881, the defendant in the judgment filed his petition, asking a rehearing and new trial, on the ground of surprise, accident, or mistake (as more fully stated in *Ex parte O'Neal*, *post*, p. 560); and that on the hearing of said petition, with the evidence for and against it, the court set aside the judgment in the cause, and granted a new trial as prayed. The appeal is sued out from this order, or judgment, and it is here assigned as error. A motion to dismiss the appeal was submitted by the appellee, on the ground that an appeal would not lie from such order, it not being a final judgment.

BRANDON & COOPER, and CABANISS & WARD, for the motion.

D. P. LEWIS, and E. O'NEAL, *contra*.

72	556
96	556
72	556
181	416

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PER CURIAM.—At one time, there was some conflict in the decisions of this court, as to the proper mode of introducing here, for revision, the action of the City or Circuit Courts in granting or refusing applications for a rehearing under the statute.—Code of 1876, §§ 3160–61. To remove all uncertainty, in *Ex parte North* (49 Ala. 385), following the earlier decisions, it was announced, that from a judgment refusing the application for a rehearing an appeal would lie, because that judgment is final, disposing of the case; but, if the application was erroneously granted, the order granting it was not a final judgment—its effect was, not a disposition of the case, but its restoration to the docket for a new trial; and prior to final judgment, the only remedy for the correction of the error is *mandamus*. This is the practice which has been since pursued.—*Heflin v. Rock Mills*, 58 Ala. 613.

The motion to dismiss the present appeal, taken from an order granting a rehearing, must, therefore, be sustained.

72	560
97	510
79	560
108	536

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Application for Mandamus to Circuit Court, in matter of Statutory Rehearing after Final Judgment at Law.

1. *Statutory rehearing at law; want of diligence in defending suit.* When an action at law is founded on a bond, or promissory note under seal, given for the purchase-money of land, the plaintiff suing as assignee; and the cause is continued, by consent, to await the termination of a suit in chancery, instituted for the purpose of setting aside the sale and conveyance; so soon as the defendant is informed of the decision of the chancery cause, setting aside the sale and conveyance, and thereby establishing the want or failure of consideration of the notes, it is his duty to prepare to defend the suit at law; and failing to show due diligence, he can not obtain a statutory rehearing after judgment by *nihil dicit* (Code, § 3161), on the ground of surprise, accident, or mistake.

APPLICATION by Emmett O'Neal, as the administrator of the estate of John Harkins, deceased, for a writ of *mandamus* to the Circuit Court of Madison, Hon. H. C. SPEAKE presiding, to compel that court to vacate and set aside an order granting a statutory rehearing after final judgment in a suit lately pending in said court, wherein said O'Neal was plaintiff, suing "as administrator of John Harkins, and assignee of George W. Karsner," and one Fleming J. Kelly was defendant. That action was commenced on the 12th June, 1879, and was founded on two bonds, or promissory notes under seal, each dated

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August 12th, 1875, and payable one day after date to said George W. Karsner; and the complaint alleged that said bonds were assigned to plaintiff by said Karsner. Judgment by *nil dicat* was rendered in the cause, on the 27th August, 1881, for \$750 debt, and \$374.80 damages; the judgment reciting that the defendant appeared, and withdrew his pleas. On the 9th November, 1881, the defendant in said judgment filed his petition in writing, verified by affidavit, asking a rehearing, or new trial, on the following grounds, as alleged:

"Petitioner shows that said two bonds, described in said complaint, were executed by him in consideration of the conveyance of land to him by said Karsner, of date August 12th, 1875; which conveyance was set aside, and declared null and void, by a decree of the Chancery Court of Lauderdale county, Alabama, rendered on March 30th, 1880, in a suit to which said Karsner and your petitioner were parties, instituted on 18th August, 1876; that there was a failure of consideration of said bonds, and that your petitioner was prevented from making his defense in said suit in said Circuit Court, by fraud or mistake, and without fault on his part, in this: Knowing that the validity of the conveyance of said Karsner to him was being contested in said Chancery Court, and expecting said Karsner to wait for the purchase-money until said contest was decided, your petitioner was surprised at being sued on said bonds before the termination of said chancery suit, and communicated with said Karsner, who assured him that, by agreement with the attorneys for the plaintiff, said suit in the Circuit Court would be continued until the termination of said chancery suit, and, if the decision of said Chancery Court was adverse to the validity of said conveyance, then said suit on the bonds would be withdrawn; and after the termination of said chancery suit, said Karsner informed him of the decree, and told him that the suit on the bonds was at end. When petitioner was served with a copy of the summons and complaint in said action, John D. Brandon, an attorney of said court, was retained to defend the suit for petitioner; and he entered an appearance in the cause, but never filed any plea. Petitioner is informed and believes, and upon such information and belief avers, that said Karsner wrote his name on the back of said bonds, and placed them with the papers of the late firm of Harkins & Karsner, of which he was the surviving partner, intending thereby to transfer them to said late firm; that he delivered them to E. A. O'Neal, to enable him to aid his defense of said chancery suit, with the expectation that said O'Neal would return them to him after making out his brief in said chancery suit, and without expectation of suit being instituted on them; that said E. A. O'Neal agreed with him that the suit on the bonds should be continued until

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the termination of the chancery suit, and, if that was adverse to the validity of the conveyance by said Karsner to petitioner, that then said suit on the bonds should be withdrawn; that said Karsner informed said Brandon of this agreement, and, after the termination of said chancery suit, informed him of the decree, and told him that the suit on the bonds was at an end; that said Brandon wrote to said Karsner, at the August term of said court, 1881, that the plaintiff was insisting on a judgment; and that said Karsner never received said Brandon's letter."

The plaintiff in the judgment, being made a defendant to the petition, filed a demurrer to it, assigning fifteen specific grounds of demurrer; among which were, that the facts stated did not negative negligence on the petitioner's part in the defense of the suit at law, and did not show that, on another trial, he could successfully defend against the assignee of the bonds. The court overruled the demurrer, and an answer to the petition was then filed by said plaintiff, denying some of its material allegations; but, as the decision of this court is based on the insufficiency of the petition, the answer requires no notice. On the hearing of the petition, with the evidence adduced, the court granted the petition, set aside the judgment, and ordered a new trial of the original cause; and this order or judgment, to which the plaintiff reserved a bill of exceptions, he now seeks to vacate by his application to this court for a *mandamus*.

DAVID P. LEWIS, for the application.

JOHN D. BRANIKON, *contra*.

STONE, J.—The present record makes a case of great hardship, but it is beyond our power to relieve it. The petition fails to show that the petitioner was free from fault and neglect in failing to make his defense. When the chancery case was decided against him, that gave him notice that he had lost the lands for which the notes or bonds were given. Losing the lands, the notes were without consideration. He should then have looked after the defense of the suit at law. The demurrer to his petition should have been sustained.—*Ex parte Walker*, 54 Ala. 577; *Beadle v. Graham*, 66 Ala. 102.

The writ of *mandamus* will be granted, commanding the Circuit Court of Madison county to set aside and vacate the order granting a rehearing, unless that court, on being informed of this ruling, itself make the order.

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Bill in Equity by Creditor, against Corporation and Officers, to enforce Equitable Lien.

1. *Misjoinder of defendants; who may take advantage of; error without injury.*—When persons who have no interest in the subject-matter of the suit, and against whom no relief is prayed, are improperly joined as defendants to a bill, the misjoinder is a defense personal to them, and the other defendants can not take advantage of it; but, if the other defendants demur on account of such misjoinder, a decree sustaining the demurrer, but without dismissing the bill, is error without injury to the complainant.

2. *Parties to bill; corporation and its officers.*—When a bill in equity is filed by a creditor against a corporation, its directors and officers, against whom no relief is prayed, and against whom no fraud, conspiracy, or breach of trust is charged, can not be joined as defendants for the sole purpose of discovery.

APPEAL from the Chancery Court of Jackson.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 25th August, 1882, by William H. Norwood, as the administrator of the estate of William G. Caperton, deceased, suing as a creditor of the Southern Railway Security Association, a foreign corporation, in behalf of himself and all other creditors of said corporation, who might come in and make themselves parties; against the Memphis and Charleston Railroad Company, a domestic corporation, R. T. Wilson, its president, Samuel R. Cruse, its secretary and treasurer, and John D. Rather and W. W. Garth, two of its directors. The bill sought to enforce against said defendant corporation an alleged equitable lien for the satisfaction of a judgment, which the complainant had obtained against said Southern Railway Security Association, and on which an execution had been returned "No property found." The material facts, as alleged in the bill, were these: Some time during the year 1873, the said railroad company leased its road, rolling-stock, and all its property of every kind, for the term of ninety-nine years, to said Southern Railway Security Association. On the 9th January, 1874, while the road was in the possession and under the control of said foreign corporation under this lease, the plaintiff's intestate, said William G. Caperton, was run over and killed by a train of its cars. An action was then brought by said Caperton's administrator, against said

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foreign corporation, to recover damages for this wrongful act ; and the action having been removed by the defendant into the Circuit Court of the United States, the plaintiff there recovered a judgment, in October, 1881, for \$10,000. While that action was pending, the plaintiff sued out an ancillary attachment, which was levied on a large quantity of cross-ties and cord-wood as the property of the defendant ; and the bill alleged that, after the rescission of the contract of lease, and before the recovery of the plaintiff's judgment, this property was taken and used by the said railroad corporation. On or about May 1st, 1874, said contract of lease was rescinded and cancelled by the mutual agreement of the parties in writing, and the railroad corporation again took possession and control of its road and property ; and the bill alleged that one of the stipulations of the agreement to rescind, and one of the considerations on which it was founded, was the promise of the defendant "to pay to complainant, and to all other persons having just debts or claims for damages against said lessee company, the amounts of their respective debts, demands and damages, whenever the same could be ascertained in a lawful way." The bill alleged, also, that the Southern Railway Security Association was insolvent when the agreement to rescind the lease was made, and was known by the defendant to be insolvent ; and that the defendant then had full notice and knowledge of the plaintiff's pending suit, "and that his claim for damages, in the event he prevailed in said suit, would be a lien on the capital stock of said railroad then in the hands and possession of said lessee company." It was alleged, also, that the original contract of rescission, or a duplicate thereof, "is in the possession and custody of said defendant, or some of its principal officers ; that a discovery and the production of said contract is material to complainant, to make out his right to the relief he prays ; that said defendant railroad company is able and can produce and discover said contract of rescission, and that such discovery is essential to your orator's right to recover."

The bill prayed that an account be ordered and stated, as to the amount due on the complainant's judgment, with interest, and as to the quantity and value of the cross-ties and cord-wood so used and appropriated by the railroad company ; "that a decree may be rendered in favor of complainant, against the said Memphis and Charleston Railroad Company, for the sum so found to be due to him ; that he may be decreed to have an equitable lien on the capital stock of said defendant railroad company, that went into said defendant's possession when said lease was rescinded, and that said lien may be enforced by due process of law ; that said defendants may be compelled to discover and produce to the court said contract entered into be-

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tween said railroad companies, by which said lease was rescinded; and for such other, further, and additional relief as the nature of the complainant's case may require."

A demurrer to the bill was filed by the Memphis and Charleston Railroad Company, specifying the following as grounds of demurrer: 1st, want of equity; 2d, misjoinder of defendants, in that no relief is prayed against any one except respondent; 3d, misjoinder of defendants, in that no relief is prayed against Rather and Garth; 4th, "that by the joinder of said co-defendants with this respondent, and by seeking and praying no relief except as against this respondent, but simply as to said co-defendants requiring their answer under oath, complainant is seeking to obtain their sworn answers, to be used as evidence in said cause, and to be relieved of proceeding to take their evidence by deposition, as provided by the rules of practice in this court; and without the observance of which rules for the taking of evidence, and by the use of said co-defendants' sworn answers in lieu thereof, this defendant is sought to be deprived of its right of cross-examination, and its other prescribed rights in the premises."

The cause being submitted to the chancellor, on the demurrers, and on motion to dismiss the bill, for decision in vacation, he overruled the demurrer as to the first, second, and third grounds assigned, but sustained it as to the fourth, on the authority of *Hogan v. Br. Bank at Decatur*, 10 Ala. 492; and he overruled the motion to dismiss, in order that the complainant might have an opportunity to amend. The sustaining of the demurrer, on that specific ground, is now assigned as error.

R. C. HUNT, and NORWOOD & NORWOOD, for appellant.

HUMES, GORDON & SHEFFEY, *contra*.

SOMERVILLE, J.—The bill is filed by the appellant, as complainant, against the Memphis and Charleston Railroad Company, a body corporate, and also several directors of the company, who are made defendants in their individual capacity.

The bill manifestly makes no case against these directors, alleging no fraud, conspiracy, or breach of trust on their part; nor is there any prayer for relief against them. There is no demurrer on their part, however, for the erroneous misjoinder; and the rule is well settled, that the right of objection is personal to them, no co-defendant being allowed to take advantage of it.—1 Brick. Dig. 753, § 1689.

The point in the case is this. The defendant railroad company interposed a demurrer, based upon this misjoinder of the directors; and the chancellor erroneously sustained it, no order

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being made as to the dismissal of the bill. Is this ruling not an error without injury to the appellant? We think it clearly is; for there is no possible aspect of the case made by the bill, in which the complainant could be prejudiced. As we have said, the directors were not proper parties defendant, and no relief was sought against them. It was not permissible to make them defendants for the sole purpose of discovery; for mere witnesses, who are shown to be cognizant of alleged facts, can never be joined for such a purpose.—*Howe v. Best*, 5 Madd. 19; Story's Eq. Plead. § 235, note 2. It was competent for the complainant to have proved these facts by the depositions of these witnesses, and no reason is given why this could not be done. Their answers in the case would clearly not have been evidence against the railroad company, their co-defendant. *Julian v. Reynolds*, 8 Ala. 680.

The decree, being without prejudice to the appellant, although erroneous, must be affirmed.

Gilman, Sons & Co. v. New Orleans and Selma Railroad Company and Immigration Association.

Bill in Equity by Judgment Creditor of Insolvent Railroad Corporation; Cross-Bill between Holders of State-Indorsed Railroad Bonds.

1. *Errors not prejudicial to appellant.*—An appellant can only complain of errors which are prejudicial to him; hence, in a chancery cause, a controversy arising between two or more defendants under a cross-bill, one of them can not assign as error the dismissal of the original bill.

2. *Answer and cross-bill, without and under statutory provisions.*—In the absence of statutory provisions, an answer and a cross-bill are separate and distinct modes of defense, and can not be blended in one pleading; and the statute which authorizes a defendant to embrace in his answer matters which might be made the subject of a cross-bill, and to have it heard and considered as a cross-bill (Code, §§ 3801-04), applies only to those cases in which relief is sought against the complainant in the original bill, and does not authorize the answer of one defendant to be converted into a cross-bill as against another.

3. *Cross-bill between co-defendants.*—Independently of statutory provisions, a cross-bill may be maintained by one or more of several defendants, asking relief against the original complainant and the other defendants; and when such a cross-bill has been filed by one defendant, bringing the entire subject of litigation before the court, a second cross-bill by another defendant is unnecessary, and is properly dismissed.

4. *State indorsement of railroad bonds; bonds for first twenty miles of road.*—Under the statute approved February 21st, 1870, entitled "An

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act to furnish the aid and credit of the State of Alabama for the purpose of expediting the construction of railroads" (Session Acts 1869-70, pp. 149-57), it was contemplated that the first twenty miles of the railroad should be completed and equipped from the resources of the corporation, before any of its bonds should be indorsed by the State, and that the indorsed bonds should be used and applied in the further construction of the road; and the bonds referring on their face to the statute under which they were indorsed, every person taking them from the railroad company was put on inquiry, and was chargeable with notice of the requirements of the statute, of the relation of the State as indorser, and of the uses and purposes for which the company could legally transfer them.

5. *Same; misapplication of said bonds.*—The company having transferred its bonds to the contractor engaged in the construction of the first twenty miles of its road, and, after procuring the State's indorsement on the completion of said twenty miles, again delivered them to him in payment of the company's debt to him; such use of them being unauthorized, and fraudulent as against the State, no liability rested on it by virtue of its indorsement, while the bonds remained in the hands of said contractor, or were in the hands of any other person chargeable with knowledge of the misapplication.

6. *Same; rights of bona fide holder.*—But, such indorsed bonds being negotiable instruments, and governed by the same rules as all other commercial paper, the State would become liable, as an accommodation indorser, to any *bona fide* holder who acquired them for value, in the usual course of business, without knowledge or notice, actual or constructive, of the misapplication by the company or its immediate transferee.

7. *Same; burden of proof as to character of transfer.*—When a subsequent holder of such bonds seeks to enforce the State's liability as indorser, the original misappropriation of them being shown, the law casts on him the burden of proving that he acquired them in good faith, for value, and in the usual course of business.

8. *Same; what is purchase for value, and in usual course of business.* The sale or exchange of such indorsed bonds for shares of stock in another railroad corporation, or in a joint-stock company or corporation engaged in the business of constructing railroads by contract, is an ordinary commercial transaction; and in determining whether the purchase is for value, the safer doctrine is, when no question of usury is involved, that the amount of the consideration, value being parted with, is only material as bearing on the question of notice.

9. *Same; proof of notice, or want of notice.*—In such case, the presumption is of a want of notice, since it is not probable, though possible, that notice of the original fraud or illegality would be communicated to a subsequent holder, thereby defeating the transfer; and the burden of proving notice resting on the party who assails the title of the holder, it is not enough to show only that he acquired the bonds under circumstances which would have excited, in the mind of prudent man, suspicions as to the title of the party from whom he purchased.

10. *Subrogation of holders of indorsed bonds, to State's statutory lien and priority.*—The holders of such indorsed bonds who have acquired them in good faith, for valuable consideration, and in the usual course of business, are entitled to be subrogated to the statutory lien and priority of the State, on the railroad company becoming insolvent, and making default in the payment of the bonds according to their terms; and this subrogation may be declared in a suit between the holders of such bonds, some of whom are not entitled to share in the protection given to the others, and although the State is not a party and can not be sued.

APPEAL from the City Court of Selma, sitting in Equity.

HEARD before the Hon. W. C. WARD, as special judge, selected

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by the parties on account of the disqualification of the presiding judge of the court.

The original bill in this case was filed on the 10th October, 1877, by Richard M. Robertson, as a judgment-creditor of the New Orleans and Selma Railroad Company and Immigration Association, a domestic corporation, which was alleged to be insolvent, and against which executions on complainant's judgments had been returned "No property found;" against the said corporation, and against T. H. DuPuy and others, who were alleged to be in control and possession of the property and railroad of the corporation; and against Gilman, Sons & Co., a firm doing business in New York city, as the holders of certain mortgage bonds which had been issued by the corporation; and against the Union Trust Company, a foreign corporation, organized and doing business in the city of New York, as the trustee in the mortgage. Its object and prayer was to set aside the mortgage, as an incumbrance on the property of the corporation, which would prevent it from bringing an adequate price under an execution sale; or to have the mortgage bonds, if any of them were lawful claims against the property, declared inferior to the lien of the complainant's judgments, and to have the property sold for the satisfaction of his debt and the other valid claims which might be presented and proved. An amended bill was afterwards filed, bringing in as defendants the several persons composing the firm of Morton, Bliss & Co., a partnership doing business in the city of New York, and the personal representative of David Crawford, deceased, as the holders and claimants of other mortgage bonds of the corporation.

The defendant corporation was chartered by an act of the General Assembly of Alabama, approved February 23d, 1866, under the name of the New Orleans and Selma Railroad Company, and was authorized to build a railroad between Selma and New Orleans; and its name was changed, by an act approved December 22d, 1868, by adding the words "*and Immigration Association.*" The corporation was duly organized under its charter, the complainant in the original bill being a large stockholder and its first president. The first twenty miles of the railroad, commencing at Selma, were built by the defendant DuPuy, under a contract with the corporation, entered into on the 22d February, 1870. By the terms of this contract, as originally entered into, DuPuy undertook to construct the entire road, at the following compensation per mile: \$16,000 of the first-mortgage bonds of the corporation, indorsed by the State as then provided by law; \$14,000 of its second-mortgage bonds; 250 shares of its capital stock, of \$100 each, and certain cash subscriptions. The act of the General Assembly approved February 21st, 1870, having required that twenty miles of its

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road should be completed, before a railroad company should be entitled to have any of its bonds indorsed by the State, and that the bonds should then be indorsed, to the amount of \$16,000 per mile, for said twenty miles, and for each continuous section of five miles when completed; the contract between DuPuy and the company was modified, on the 16th May, 1870, and it was stipulated that his compensation should be, for the first twenty miles, \$16,000 per mile of the unindorsed bonds of the company, 300 shares of its capital stock, \$140,000 subscribed by Dallas county, and other cash subscriptions; and on the completion of the first twenty miles, as required by the said act of February 21st, 1870, the company agreed, "for the purpose of building and expediting the construction and equipment of the second section of twenty miles of said road, to advance and pay to the said party of the second part [DuPuy] \$320,000 in the mortgage bonds of said company, indorsed by the State of Alabama," and at that rate for each continuous five miles.

On the 16th July, 1870, the railroad company executed a mortgage, or deed of trust, by which it conveyed to the Union Trust Company, of New York, its franchise, road and property, to secure bonds which it proposed to issue for the purpose of raising money, as recited in the resolutions of the company, which were set out in full in the mortgage, "to enable this company to construct and equip its road beyond the first twenty miles, that much having been already provided for;" the bonds to be in a prescribed form, for \$1,000 each, payable on the 1st July, 1895, with interest at the rate of eight per-cent. *per annum*, payable semi-annually, at the office or agency of the corporation in the city of New York; each containing on its face the words "*To be indorsed by the State of Alabama*," and a recital in these words: "This is one of a series of bonds, of like tenor, date and amount, numbered consecutively from one upwards, and limited to sixteen thousand dollars per mile of completed and equipped railroad in the State of Alabama; secured by a mortgage, bearing even date herewith, of the railroad, with its equipments and appurtenances, and franchises of the said corporation which relate thereto; issued under the provisions of an act of the General Assembly of Alabama, entitled 'An act to furnish the aid and credit of the State of Alabama for the purpose of expediting the construction of railroads,' approved February 21st, 1870; all secured by a first lien, provided for in said act, on the railroad of said company, its equipments, and all other property relating thereto, including the franchise of the company, with power of sale in case of default; and by indorsement of the State of Alabama, made under authority, and in pursuance of the act of the General Assembly aforesaid."

Of the bonds provided for in this mortgage, 320 were issued,

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of even date with the mortgage, were delivered to DuPuy by the company; and in June, 1871, the first twenty miles of the road having been completed, he re-delivered them to the company, in order that the State's indorsement might be procured; and the indorsement having been made, after full compliance with the provisions of the statute, the bonds were again delivered to DuPuy, and were transferred by him to David Crawford and the persons composing the firm of Morton, Bliss & Co., in payment of debts which he had contracted with them for iron and materials purchased and used in the construction and equipment of said twenty miles of the road. Of the bonds which Crawford received, he transferred 58, numbered from 263 to 320, to Gilman, Sons & Co., in exchange for "Des Moines Valley Construction Company" stock, and "Des Moines Valley Common" stock. This contract was made on the 17th October, 1870, before the bonds had been indorsed by the State; and it was stipulated in the contract, as shown by the memorandum, that the bonds were "to be guaranteed by the State of Alabama, and to bear eight per-cent coupons; interest to begin January 1st, 1871, and bonds to be delivered within about sixty days." The bonds were actually delivered, and the contract consummated July 22d, 1871.

An answer to the bill was filed by Gilman, Sons & Co., claiming to be *bona fide* purchasers of the 58 bonds held by them, denying the validity of the other bonds in the hands of Crawford and Morton, Bliss & Co., and insisting that, in any event, they were entitled to priority over the holders of those bonds. They incorporated in their answer a cross-bill, making the original complainant, Robertson, Crawford, Morton, Bliss & Co., DuPuy, and the railroad corporation, parties defendants thereto; and praying that the equities and relative priorities of the parties might be adjusted, an account taken, and the railroad sold for the satisfaction of the debts found due. A demurrer to this cross-bill was filed by Morton, Bliss and their associates, on the ground that the statute did not authorize an answer to be joined with a cross-bill as between co-defendants; and, having answered the original bill, they filed a formal cross-bill, making all the parties interested defendants thereto, and praying relief as follows: "(1.) That the validity and order of priority of the several and respective liens and claims of the parties to this action, upon and against the said railroad and other mortgaged property and premises hereinbefore described, may be determined and decreed. (2.) That it may be ascertained, determined and decreed, who are the *bona fide* holders and owners of the bonds hereinbefore referred to; which are outstanding, and to what extent and for what sums the same are valid obligations, or are secured by the said deed of trust and statutory mortgage

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hereinbefore referred to, and what are the rights respectively of the owners of said bonds. (3.) That the said railroad, and all the property embraced in and described or referred to in said deed of trust, including right of way, property, franchises, capital stock, rights and appurtenances, and all and singular the locomotives, cars, machinery, fixtures, implements, chattels and effects, of every nature and kind whatever, in any wise appertaining to said railroad, or belonging to said corporation, be sold, in such manner as this court shall direct. (4.) That an account be taken in respect to the money due upon said bonds secured by said deed of trust and statutory mortgage, for principal and interest; that the holders thereof be ascertained; that the proceeds of sale be applied, under the direction of the court, to the payment and discharge of the said several sums; and that this suit and the said original suit may constitute but one cause, and as such be heard together. (5.) And that your orators may have such other and further relief in the premises as the nature of the case may require," &c.

On final hearing, on pleadings and proof, the special judge sustained a demurrer to the cross-bill of Gilman, Sons & Co., and dismissed it; and he also dismissed the original bill, holding that the complainant showed no right to relief, either against the bondholders, or against DuPuy. But he retained the cross-bill of Morton, Bliss *et al.*, as being in the nature of an original bill; and rendered a decree under it, declaring that, while none of the bondholders were *bona fide* purchasers for value as against the State, they were entitled to have the mortgage foreclosed by a sale of the property, and to share equally in the proceeds of the sale. Gilman, Sons & Co. appeal from this decree, and here make thirty-six assignments of error; the principal assignments being, the dismissal of their cross-bill, the decree rendered under the cross-bill of Morton, Bliss *et al.*, the refusal to decree priority to the appellants over the other bondholders, and the rulings on numerous exceptions to evidence.

R. M. WILLIAMSON, and J. T. HOLTZCLAW, with whom were E. W. PETTUS and D. S. TROY, for the appellants.—The bonds, on their face, are such bonds as the statute contemplated; and the State's indorsement was made on proof of full performance of all the conditions prescribed, and strict compliance with all the statutory requisitions. They are, and were intended to be, negotiable instruments; and when thus put on the market, a *bona fide* purchaser for value was not bound to inquire into these matters, but might rely on the security of the State's indorsement.—*Plock & Co. v. Cobb*, 64 Ala. 127; *Pond v. Lockwood*, 8 Ala. 669; *Winston v. Westfeldt*, 22 Ala. 760. The misapplication of the bonds by DuPuy did not invalidate them

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as securities governed by the commercial law, though it would prevent any one who participated in such misapplication, or who acquired them with knowledge thereof, from enforcing any liability against the State as indorser. This is the position occupied by Morton, Bliss & Co., and by Crawford: they received the bonds from DuPuy, in payment of their debts contracted for materials and supplies sold and furnished to build the first twenty miles of road, knowing that they could only be legally applied to the further extension of the road. But Crawford contracted to sell Gilman, Sons & Co. bonds "to be indorsed by the State of Alabama;" and when he delivered the bonds under his contract, they were so indorsed. His contract was a guaranty of the indorsement; and to permit him now to assail the validity of the indorsement, would enable him to perpetrate a fraud on the purchasers.—*Emanuel v. Atwood*, 6 Porter, 384; 1 Dan. Neg. Instruments, 752-5. The appellants, as purchasers, are directly injured by this attempted fraud; since, if the bonds had not been misapplied, there would now be forty (instead of twenty) miles of road completed and equipped, and subject to the lien of the mortgage. But Gilman, Sons & Co. are not affected by the infirmity which attached to the bonds while in the hands of Crawford, and which still attaches to those held by his administrator, and by Morton, Bliss *et al.* They acquired their bonds in good faith, for value, and in the usual course of business. The *onus* was on them to show that they paid value, before maturity, and in the usual course of trade; and these facts are affirmatively shown. The *onus* then devolved on the adverse party, to show notice or knowledge of the infirmity of the paper, or facts which should have put them on inquiry; and this is not proved. As *bona fide* holders of these indorsed bonds, the appellants are entitled to priority over the other bondholders, and to be subrogated to the State's prior lien.—*Colt v. Barnes*, 64 Ala. 108; *Knighton v. Curry*, 62 Ala. 404.

BROOKS & ROY, with whom was S. F. RICE, *contra*.—1. *As to the pleadings.* The original bill was properly dismissed, because the complainant was not entitled to any relief as against the bondholders or the railroad company. The cross-bill of Gilman, Sons & Co. was defective in form and parties; and being also unnecessary, after the cross-bill of Morton, Bliss *et al.* was filed, it was properly dismissed. The cross-bill of Morton, Bliss *et al.* was in proper form, brought in all the parties interested, and presented the entire subject of litigation for decision; and it was properly retained, notwithstanding the dismissal of the original bill.—Cooper's Dan. Ch. Pl. 1550, 1554, notes; Story's Eq. Pl. § 398; 2 Barb. Chan. Pr. §§ 128-9;

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Wickliffe v. Clay 1 Dana, 589; *Madison v. Wallace*, 2 Dana, 63; *Winn v. Dillard*, 60 Ala. 369.

2. *As to the status of the bonds as against the railroad company and its property.* The bonds all bear the same date, are secured by the same mortgage, refer to the same statute, were issued by the company at the same time, delivered to DuPuy in payment of his debt, and by him negotiated to Crawford and Morton, Bliss & Co. Their *status* is not affected by the recital in the mortgage of the company's intention to issue them for the further construction of the road beyond the first twenty miles; nor by DuPuy's stipulation in his contract to apply them in that manner. As against the company, that stipulation was without consideration, and he could successfully defend against any action for its breach.—*Overdeer v. Wiley, Banks & Co.*, 30 Ala. 709. The fact that the bonds were hypothecated, or held as collateral security, would not affect the right of the holders to foreclose the mortgage.—*Jones on Railroad Securities*, § 435. As against the company and all persons holding in privity with it, DuPuy in the first place, and Crawford and Morton, Bliss *et al.* in the second, were holders for value of the entire series of bonds; and the present holders, succeeding to their rights, may compel the specific application to the payment of the debt, whether the liability be referred to the contract or to the statute, and although the State may be discharged from liability as indorser.—*Kelly v. Trustees*, 58 Ala. 500; *Colt v. Barnes*, 64 Ala. 108; *Forrest v. Luddington*, 68 Ala. 1; *Cromwell v. County of Sac*, 6 Otto, 51; *Howell v. Western Railroad*, 4 Otto, 465; *Mayberry v. Morris*, 62 Ala. 113.

3. *As to the issue between Gilman, Sons & Co. and the other bondholders.* The mortgage and the bonds constitute but one contract, and are to be read and construed together. The mortgage contains an express stipulation, that the bonds are to be paid, "without priority to any holder," in full, or, if the property prove insufficient, "*pro rata*, so that no priority shall be given to any bond or bonds;" and in the absence of such a provision, the general rule of law would require equality. Morton, Bliss and their associates assert the validity and equality of the entire series of bonds, as against the corporation and its property; while Gilman, Sons & Co. claim to have acquired their bonds in such a manner as to give priority to them over the remainder of the series, and to entitle them to be subrogated to certain alleged rights of the State of Alabama. To support their position, they must show, first, that the State has property rights in the premises, which may be the subject of such subrogation; and, secondly, that their *status* entitles them to claim these rights to the exclusion of the other bondholders. Each

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of these propositions, it is insisted, is without foundation in law or in fact.

(a) *As to the claim of subrogation.* If the rights of the parties are to be referred only to the statute, and to be determined by it alone, there can be no subrogation to the rights of the State, in the sense asserted by Gilman, Sons & Co.; because the public rights of the State can not be made the subject of subrogation; because the rights secured by the statute to the bondholders are direct and absolute rights of their own, and not rights which are to be worked out through the State, the mere stakeholder and trustee, in this respect, for the bondholders; and because the right of ultimate indemnity secured to the State is contingent (that is, dependent on its having been damaged by some payment as indorser), and subordinate to the paramount right of the bondholders to be paid in full, without which the State can not be damaged. The statutory mortgage and lien are created and declared for the benefit of the bondholders—"for the payment of said bonds by said company, with the interest thereon as it becomes due;" "for the payment of said bonds indorsed for the company, as provided in this act, and for the interest accruing on said bonds;" "to secure the payment of said bonds, with the interest thereon, and to indemnify the State against any loss on account of the indorsement of said bonds." The statute simply makes the State a trustee for the bondholders, vests it with certain powers, and imposes on it certain duties, to be exercised and performed for the benefit of the bondholders in the first instance, and ultimately for its own protection and indemnity. There is no room for the application of the doctrine of subrogation, as applied between sureties and the common creditor. The public powers and duties devolved upon the State by the statute can not be the subject of subrogation, because they are public, and because they are not susceptible of money valuation. The only property right secured to the State is the right to "payment of said bonds by said company, with the interest thereon;" and this right is secured directly to the bondholder, and is not to be worked out through the surety.—*McMullen v. Neal*, 60 Ala. 555. To make the test of priority the right of the holder to sue and recover on the indorsement, is a fallacy in argument, and is impossible of execution. The conditions annexed by the statute, to the indorsement of the bonds, do not go to the validity of the statutory mortgage: the statutory lien is complete and perfect in itself, as against the company and all its property, without reference to those conditions, as any other lien created or defined by statute. And that test would be impracticable and impossible, since the State can not be sued; nor would it be bound by any adjudication to which it was not a party.

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The bonds were all indorsed by the governor, in the name of the State. He was the officer appointed by law to determine whether the statute had been complied with, and he was clothed with *quasi-judicial* powers for that purpose. The evidence upon which he was to act was prescribed, and his decision was final. His indorsement of the bonds was an adjudication of their validity, and of the existence of every fact essential to their validity; and it was intended to give the bonds full faith and credit in the markets of the world. There is no intimation in the statute that the indorsement would be vitiated by any fraud in obtaining it, or by any subsequent wrongful use of the bonds. On the contrary, the State relied for its protection on the safeguards provided by the statute.—*Plock & Co. v. Cobb*, 64 Ala. 127; *Nat. Bank v. Matthews*, 8 Otto, 621.

In the case of *Colt v. Barnes*, 64 Ala. 108, the court held that indorsed bonds were entitled to preference and priority over unindorsed bonds; and though the doctrine of subrogation was discussed, the real basis of the decision, it is submitted, must rest on the ground, that both the statute and the mortgage provided for such priority. But no such question can arise here, where all the bonds are indorsed, and no claim is preferred on account of any unindorsed bonds. The later case of *Forrest v. Luddington*, 68 Ala. 1, fully recognizes and affirms the principles herein contended for.

(b) *As to the claim of purchaser for value without notice.* If the suit were against the State, like any other accommodation indorser of negotiable paper, the *onus* would be on the defendant to prove notice of irregularity, or the like. But here, all the bonds being issued, indorsed, and received for value, all the holders stand on an equality; and when any one seeks to establish for his bonds a different and better *status*, he must allege and prove, according to the general rules of law, the facts necessary to make good his claim. He must deny notice, positively and particularly, and not generally or evasively; and where there are circumstances tending to show notice, the law "exacts the clearest and most explicit denial of notice."—*Ledbetter v. Walker*, 31 Ala. 179; *Wells v. Morrow*, 38 Ala. 128; *Moore v. Clay*, 6 Ala. 751. If the pleading falls short of this rule, relief will not be granted, no matter how full and satisfactory the proof may be.—Same authorities. If the pleading be sufficient, the *onus* is on the holder to show, by satisfactory evidence, that he acquired the bonds "for valuable consideration, before maturity, in the usual course of trade, and without notice of any defect or infirmity in the title."—*Reid v. Bank of Mobile*, 70 Ala. 199; *Mayor v. Plank-Road Co.*, 63 Ala. 632. The rule as to notice is, that whatever is sufficient to put a prudent man on inquiry, is sufficient to charge a party with

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notice of every fact which inquiry would have developed. *Foster v. Stallworth*, 62 Ala. 549; *Wilson v. Wall*, 34 Ala. 303. The claim of Gilman, Sons & Co., tested by these rules, must fail on the pleadings, and equally on the proof.

Their pleadings, in their cross-bill and answer, set up their claim in these words: "At the time of procuring said 58 bonds, respondents had no knowledge, information, belief, or suspicion, that there was any defense against said bonds, or any of them, or any doubt or question of their legality, validity, or binding obligation; and respondents aver that they purchased said bonds in good faith, and for the full par value, without any knowledge or notice of any of the facts alleged in said original and amended bills against the same." In assailing the other bonds, their language is: "None of said bonds numbered from one (1) to 262 were ever issued or negotiated by the said New Orleans and Selma Railroad Company and Immigration Association; and none of them have ever passed into the hands of *bona fide* holders for value, without notice that the same had not been negotiated by the said corporation; and none of them are secured by, or entitled to, the precedence and priority of lien given by the said act of the General Assembly; and if any of them are protected and secured in any manner by said deed of trust, their lien is subordinate to the lien of the bonds purchased and now held by these respondents." These allegations are the mere statement of legal conclusions, and are insufficient.—*Willingham v. Harrell*, 36 Ala. 580; *Duckworth v. Duckworth*, 35 Ala. 70; *Flewellyn v. Crane*, 58 Ala. 628; and authorities above cited.

Their evidence is fatally defective, and the weight of proof is against them. Only three of the partners are examined as witnesses, and their denial of notice, however full, would not negative notice to the fourth partner. As against the estate of Crawford, from whom they purchased, their evidence was incompetent, and was objected to on that ground.—*Stuckey v. Bellah*, 41 Ala. 700; *McCrary v. Rash's Adm'r*, 60 Ala. 374. An examination of their answers, too, will show such indefiniteness and evasiveness, as manifests an effort "to manufacture the defense of innocent purchaser out of facts not quite sufficient to authorize it" (*Ledbetter v. Walker*, 31 Ala. 179), and amounts to an implied admission of the fact not directly denied. As where W. S. Gilman is asked, "State when you, or, so far as you know, said firm, first heard that said bonds had been issued in consideration of money or materials used in the construction of the first twenty miles of said road;" his answer is, "I never had any information regarding the construction of the road, except what appears on the face of the bonds, until the receipt of a letter from C. M. Shelley, dated 10th September, 1875."

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Against their indefinite denials is the positive testimony of John Tucker, who knew all the facts, and who testifies that his interview with them was had for the purpose of informing them of the facts, and that he did impart to them all the facts. Eight months elapsed from the time the contract was entered into, before the bonds were actually delivered, although it was stipulated that they were "to be delivered in about sixty days." The delay would naturally cause inquiry, and inquiry would have developed the fact that the first twenty miles of the road were not completed; and they are charged with implied notice of that fact when they bargained for the bonds. Aside from the question of notice, the proof is that they purchased the bonds at the rate of 85 cents on the dollar, while the statute prohibited their sale or use at less than 90 cents; and paid for them in railroad scrip, which was at the time worth only five or ten cents on the dollar, and which shortly afterwards proved wholly worthless. These are not the *indicia* of an ordinary commercial transaction, and do not support the claim of a purchase for value in the usual course of business.

BRICKELL, C. J.—1. The original bill was filed by a judgment-creditor of the "Selma and New Orleans Railroad Company and Immigration Association," who had exhausted his remedies at law; and its main purpose was to remove, as an obstacle in the way of obtaining satisfaction of his judgment, a mortgage, or deed of trust upon the property of the company, given to secure bonds it had issued. The appellants, as holders of a number of these bonds, were made parties defendant; and they appeared and answered, affirming the validity of the bonds, and of the mortgage given as security for the payment; and also asserting that, as *bona fide* holders of the bonds, they were entitled to be subrogated to the paramount lien of the State as indorser, recognized in the mortgage. The dismissal of the original bill, if erroneous, can not in any event operate prejudicially to the appellants, and of it they can not be heard to complain. It is only matters which are of injury to the parties appealing, that will be noticed on error.

2-3. In the absence of statutory provisions, a cross-bill and an answer are essentially separate and distinct pleadings; and it is irregular to join and blend them,—as irregular as it would be to join and blend an amended and supplemental bill. Generally, a cross-bill is a mere mode of defense; and if all its purposes can be obtained by answer, the bill will not be entertained. There are some defenses which, however, can not be made by answer; and often, in aid of the defense, a discovery from the plaintiff in the original bill is necessary. And as a general rule, by answer the defendant can pray only to be dismissed; if he

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is entitled to relief touching the matter of the suit, he can obtain it, in the pending suit, only by cross-bill.—*Cullum v. Erwin*, 4 Ala. 452; *Goodwin v. McGehee*, 15 Ala. 232. Frequently, co-defendants have, as between themselves, opposite and clashing interests touching the matter of suit; without an adjustment of which, a complete decree, quieting the litigation, can not be rendered. In such case, either defendant may file a cross-bill; or the court may order it to be filed, bringing before the court the whole matter of litigation, and enabling it by one decree to settle the rights and interests of all parties,—*Cullum v. Erwin*, *supra*; Story's Eq. Pl. § 392; 2 Dan. Ch. Pr. 1548.

It is a cross-bill of this latter character which was incorporated in the answer of the appellants originally; a bill not seeking any discovery from the complainant in the original suit, or any relief against him, but seeking relief only as against the railroad company, and the other holders of its bonds, and the establishment and enforcement of the prior right of the appellants to the payment of the bonds held by them. According to the rules of pleading and practice prevailing in courts of equity, unchanged by statute, there can be no doubt that the appellants were without right to make an answer serve the purposes of a cross-bill. The court and the parties could have silently disregarded so much of the answer as purported to be a cross-bill; the failure of any party defendant to appear and plead to it, would not have authorized a decree *pro confesso* against him; or, on motion or exception, it would have been stricken out as impertinent; and the appellants, whatever may have been their right to file a cross-bill, or however necessary such a bill may have been for their protection, would have been in court in no other condition than as respondents who had only answered.

The statute provides, that a defendant may obtain relief against the complainant, for any cause connected with, or growing out of the subject-matter of the bill, by alleging in his answer, and as a part thereof, the facts upon which such relief is prayed, and that the complainant shall answer the same. The matter thus put in issue "must be considered in the nature of a cross-bill, and be heard at the same time as the original bill." Code of 1876, §§ 3801-04. It is apparent the statute refers to but one of the several kinds of cross-bill,—that in which relief is sought only against the complainant in the original bill; and has no reference or application to the other distinct and different kind of cross-bill, in which no relief is sought against him, to which he is a party rather for the sake of conforming the pleadings to the cause to which they belong, and affecting him by any order which may be rendered, staying, if necessary, a hearing on the original bill until the cross-bill is ripe for hearing

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with it; and in which relief is sought only against co-defendants. After demurrer upon this ground, to so much of the answer as purported to be a cross-bill, the appellants amended, by striking out the answer, and filing it as a separate pleading. But, before the amendment, the co-defendants, Morton, Bliss and others, had filed a cross-bill bringing the whole matter of litigation before the court, and under which the appellants could obtain full relief. In this condition of the cause, the cross-bill of appellants was properly dismissed. A cross-bill is not entertained, when in the original suit the party filing it can obtain the full relief to which he is entitled. It is unnecessary, adds to the costs, and tends to confusion; and without the restriction, cross-bills would be multiplied at the mere election of defendants.— *Weed v. Small*, 3 Sand. Ch. 273; *Braman v. Wilkerson*, 3 Barb. (S. C.) 151; *Bogle v. Bogle*, 3 Allen, 158.

4. The more important question the case involves is, whether the appellants are entitled to subrogation to the statutory lien of the State, as indorser of the bonds of the railroad company. In the consideration of this question, we do not find it necessary to pass upon the numerous exceptions to evidence which were sustained by the City Court. The material facts upon which the right depends, if it exists, are shown satisfactorily by the pleadings, and by evidence to which no exception was taken. These facts are, that the company had contracted with DuPuy for the construction of its road, and, while he was engaged in the construction of the first twenty miles, issued to him its bonds, three hundred and twenty in number, each for the payment of one thousand dollars, payable to the holder thereof, at the agency of the corporation in the city of New York, bearing interest at the rate of eight per-cent., payable semi-annually; the bond reciting on its face, that it was one of a series limited to sixteen thousand dollars per mile of equipped and completed railroad in the State of Alabama; and further, that it was "secured by a mortgage, bearing even date herewith, of the railroad, with its equipments, and appurtenances, and franchises of said corporation which relate thereto, issued under the provisions of an act of the General Assembly of Alabama, entitled 'An act to furnish the aid and credit of the State of Alabama, for the purpose of expediting the construction of railroads,' approved February 21st, 1870; all secured by a first lien, provided for in said act, on the railroad of said company and its equipments, and all other property relating thereto, including the franchises of the company, with power of sale in case of default, and by indorsement by the State of Alabama, made under authority and in pursuance of the act of the General Assembly aforesaid." Having completed and equipped the first twenty miles of road, the bonds were returned to the company, that the indorsement

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thereof by the State should be obtained; and the preliminary proofs required by the statute having been made, the Governor, in the name of the State, indorsed them. The bonds were then re-delivered to DuPuy, who applied them to pay the debt the company had incurred with him for the construction and equipment of the first twenty miles of the road; and he passed them to David Crawford, to whom he had become indebted for money borrowed, and to Morton, Bliss & Co., to whom he had become indebted for railroad iron, while engaged in such construction, they having notice of the application DuPuy had made and was making of the bonds. Fifty-eight of these bonds Crawford subsequently transferred to the appellants, under circumstances, and upon a consideration which will be hereafter noticed.

The real relation of the State was that of an accommodation indorser of the bonds of the company. For the indorsement there was no consideration of value moving to the State, and its only purpose was giving credit and currency to the circulation of the bonds. In the words of the title of the statute which authorized the indorsement, the purpose was, "to furnish the aid and credit of the State to expedite the construction of railroads." Until twenty continuous miles of road had been completed and equipped, the indorsement of bonds by the State was unauthorized; and the completion and equipment must have been from resources of the company, distinct and independent of such as were or could be derived from a negotiation of the bonds indorsed by the State. The plain purpose of the statute was, that the indorsed bonds should be applied to no other uses or purposes, than to the further construction and equipment of the road. The indorsement was of no force—as a contract, it had no legal inception—until the bonds were by the company negotiated. The bonds referring to the statute under which they were indorsed, every person dealing in them was put on inquiry, and at his own peril was bound to take notice of its requirements, of the relation of the State as indorser, and of the uses or purposes for which the company could legally and properly transfer them.—Jones on R. R. Securities, sections 226, 297, 27; *N. O., M. & C. R. R. Co. v. Dunn*, 51 Ala. 128; *McLure v. Township of Oxford*, 94 U. S. 429.

5. The application of the bonds by DuPuy to pay the debt the company had contracted with him for the completion and equipment of the first twenty miles of the road, was in direct contravention of the statute—was a diversion of the bonds from the uses and purposes to which they were by the statute appropriated, and to which the company, by the very act of procuring and accepting the indorsement, agreed they should be solely and exclusively appropriated. Whether the company assented

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to the application, or whether they re-delivered the bonds to DuPuy, upon his promise to continue the construction and equipment of the road, and to use the bonds to raise money for that purpose, is not material. With full knowledge of the only uses and purposes to which they could be appropriated, he applied them to the payment of the existing debt of the company, in contravention of the statute, and in violation of the agreement of the company under which the credit of the State was loaned; and thereafter he abandoned his contract to construct further the road. Whoever takes accommodation paper, with knowledge that the terms and conditions upon which the accommodation was given are being violated; whoever participates in the diversion of the paper to other objects or uses than such as were intended when the paper was made, unless fraud is imputed, must be understood to relieve the party giving the accommodation from all liability, whatever liability the party with whom he deals may incur.—2 Parsons Notes and Bills, 27; 1 Dan. Neg. Inst. 594.

It was the interest of the State that the further construction of the road should be continued—to expedite the construction the bonds were indorsed. There was no general lending of its credit by the State, but a loan upon terms and conditions; and a diversion of the bonds from the uses to which it was designed they should be applied, and their application to uses prohibited by the statute, would be a fraud, if the parties intended to assert its liability. As between DuPuy and the State, the indorsement had no binding force; as a contract, it had not legal inception. Crawford, and Morton, Bliss & Co., acquiring the bonds from DuPuy, with knowledge that he had applied them in payment of a pre-existing debt of the company, in violation of the statute, and in violation of the terms and conditions upon which the indorsement of the State was made, chose to receive them with all the infirmities to which they were subject in DuPuy's hands—they were substituted to his place, acquiring only his rights.

6. The bonds were negotiable instruments; the purpose of making or issuing, as well as of indorsing them, was, that they should be employed in raising money by sale, or otherwise, in the usual course of business; that they should be employed for all the purposes for which bank-notes could be employed. The principles of the law-merchant, founded upon considerations of public policy and the necessities of commerce, “so well and so long established, that it is laid up among the fundamentals of the law, and neither reasons nor authorities are now necessary to be brought forward in its support,” affirms the right and the title of a *bona fide* holder, for value, of negotiable paper, acquired before maturity, whatever may be the defenses or equi-

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ties existing as against antecedent parties.—*Swift v. Tyson*, 16 Peters, 1; *Goodman v. Simonds*, 20 How. 343; *Murray v. Lardner*, 2 Wall. 110. The State, though there had been an appropriation of the bonds to uses which were excluded by the terms and conditions upon which its indorsement was lent to the railroad company, and as to the State the bonds can be said properly to have been put in circulation fraudulently, would become liable to a *bona fide* holder, taking them without knowledge of the misappropriation, or of the fraud.—Jones on Railroad Securities, section 284; *State, ex rel. Plock v. Cobb*, 64 Ala. 127.

7. Whether the appellants stand in this relation—whether they acquired the bonds for value, without knowledge of the infirmity of the indorsement of the State, and of the title of Crawford, is a material point of contention. The question must be considered and determined, as it would be if the State were a party, and the immediate object of the suit was the enforcement of the indorsement. The fact being shown that there had been an appropriation of the bonds to uses which were excluded by the terms and conditions of the indorsement; and as to the State, if the purpose was not to relieve and release it from liability, the bonds were put in circulation fraudulently; upon the holder, pursuing the State, the law casts the burden of proving that he acquired them for value, in good faith, and in the usual course of business.—*Wallace v. Br. Bank Mobile*, 1 Ala. 565; *Thompson v. Armstrong*, 7 Ala 256; *Ross v. Drinkard*, 35 Ala. 434. The right of the antecedent holder to assert the liability of the State is destroyed, or, rather, is shown never to have existed; and the right of subsequent holders, resting only on a title derived from him, which has not some other foundation, can not rise superior to it. A higher and better right, resting upon its own foundation, is shown, when it appears that in good faith, upon a consideration of value, in the ordinary or usual course of business, the bonds were acquired.

8. If the appellants are holders for value, there can be no question the bonds were taken according to the customs and usages of mercantile transactions. The sale or exchange of such securities for shares of stock in railroad corporations, or for the shares of the stock of companies organized either as joint-stock companies, or as corporations, for the construction of railroads by contract, is, doubtless, an ordinary commercial transaction. The controversy seems to be directed specially to the *sufficiency of the consideration* with which the appellants parted, and whether there were no circumstances attending the transaction which ought to have excited inquiry into the nature of Crawford's title, and the manner in which he had obtained the bonds. The facts are, that on 17th October, 1870, appellants sold to Crawford shares of stock in the Des Moines Valley Construction Com-

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pany, of the nominal value of three hundred thousand dollars; Crawford agreeing to deliver, within about sixty days, the bonds of the Selma and New Orleans Railroad Company, &c., guaranteed by the State of Alabama, bearing eight per-cent. interest, for fifty-eight thousand dollars, the interest to begin on the first day of January, 1871. The stock was greatly depreciated, not having probably a marketable value exceeding ten cents to the dollar of its nominal value. Of the company, Crawford was treasurer, and a large stockholder. The bonds were not indorsed by the State until 14th July, 1871, and were not delivered to the appellants until the 22d of that month. It is apparent the bonds were estimated by the parties as of their face value; for delay having occurred in their delivery, the interest during the period of delay they would have borne, Crawford paid to the appellants in money. Not long afterwards, the Des Moines stock became valueless in consequence of the failure of the company. There is not in the transaction any fact indicating that the parties regarded the bonds of doubtful, or of uncertain value, however they may have regarded the stock with which they were purchased.

It is only a purchaser or holder, *for value*, not a mere volunteer, the law protects against equities and defenses to which negotiable paper would be subject in the hands of antecedent holders. The books employ various expressions; sometimes it is said *full value* must have been parted with; sometimes *fair and reasonable value*; but most often, perhaps, the single word *value* is employed. The principle is analogous, in many respects, to that which prevails in courts of equity for the protection of *bona fide* purchasers against equities affecting the legal estate, of which they have not notice.—2 Lead. Eq. Cases, 103. Generally, it is agreed, that it is not necessary to constitute a *bona fide* purchaser of the legal estate, or a *bona fide* holder of negotiable paper, that he should have parted with money, or money's worth. If he parts with, or cedes an existing right, or if he forbears, or suspends legal remedies, there is, in the legal sense of the term, a valuable consideration.—1 Amer. Lead. Cases, 226; 2 Lead. Eq. Cases, 103. In considering this question, it is said in *Goodman v. Simonds*, 20 How. 371: "The better opinion seems to be, in respect to parol contracts, as a general rule, that there is but one measure of the sufficiency of a consideration; and, consequently, whatever would have given validity to the bill as between the original parties, is sufficient to uphold a transfer," &c. There would be much of difficulty and uncertainty in the application of any other principle. It can not be supposed, that only the party giving in money the full face-value of negotiable paper, or its equivalent in property, is a *bona fide* holder for value. Whenever, from any cause—de-

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pression of the money market, or depression in the affairs of the State, or of corporations—there was depreciation in the value of such securities as were the subject of this transaction, such a rule would stop their circulation, and divest them of the legal incidents of negotiability. If it be said, there must be a fair and reasonable consideration, the inquiry at once arises, what is to be deemed such a consideration; an inquiry it would be as difficult to determine, as it would be to determine the inadequacy of consideration which would justify the rescission of a contract. The safer doctrine, it seems to us, is, that when the holder, as in the present case, parts with value, no question of usury being involved, the amount of the consideration is material in no other respect than as it may bear upon the inquiry, whether he had notice, actual or constructive, of the infirmity of the paper, or of the title to it.—*Gould v. Segee*, 5 Duer, 260.; *Phelan v. Moss*, 67 Penn. St. 59.

There is no reason for supposing that Crawford purchased the stock with a view to its immediate conversion into money at its market value. The relation he sustained to the company would rather indicate that he regarded it as of greater value. But it is not necessary to speculate upon the reasons which may have induced him into the transaction; there can be no doubt, if he had given for the stock his own negotiable paper of the precise amount of the bonds, that it would have been supported by a sufficient consideration. The appellants parted with the stock, and he acquired it, in the usual course of business; and the relation of the appellants is that of holders of the bonds for value.

9. The appellants, having acquired the bonds for value, in the usual course of business, can not be affected by the fraud and illegality of DuPuy's appropriation, and Crawford's acquisition of them, unless notice of it can be traced to them. The presumption is of a want of notice; for, "though possible, it is not likely, that notice of the original fraud or illegality would be communicated to subsequent holders." It is not incumbent upon them to prove the absence of notice; but it is incumbent on the party assailing the presumption, and questioning their title, to prove it. — *Byles on Bills* (6th Amer. Ed.), 194; *Carpenter v. Longan*, 16 Wall. 271. There is no evidence of direct notice. The evidence of Tucker, as to the interviews he had with one or more of the appellants, at the instance of Crawford, is too vague and indefinite to justify the inference that he communicated the fact that Crawford had, or would acquire the bonds from DuPuy, in violation of the terms and conditions upon which the indorsement of the State was loaned, thereby relieving the State from liability. It was for bonds guaranteed by the State, the appellants contracted, and Crawford promised

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to deliver. The guaranty or indorsement of the State became worthless to them, if, at the time of the contract, they were informed of DuPuy's misappropriation; and it was idle for them to contract for bonds of that description. And it is scarcely possible that Crawford, who brought about the interview for the purpose of inducing the appellants into the transaction, would have invited a disclosure of the infirmity of his title as against the State. All that can be said of Tucker's evidence is, that at Crawford's instance he communicated to one or more of the appellants the number of miles of road the railroad company had constructed, and that the bonds were the first-mortgage bonds of the company. If any other particular facts were communicated, he does not disclose them.

In reference to the facts which it is supposed ought to have put the appellants upon inquiry as to the manner of Crawford's acquisition of the bonds, it is enough to say, that the largest significance claimed for them is, that they might have aroused suspicion as to his title. It is not, under the prevailing principles of the commercial law, enough to defeat the title of the holder of negotiable paper, to show that he acquired it under circumstances which would, in the mind of a prudent man, have excited suspicion as to the title of the party from whom he derived it.—*Goodman v. Simonds, supra*; *Murray v. Lardner, supra*; *Phelan v. Moss, supra*. It is apparent from the contract, that it was expected Crawford would thereafter acquire the bonds; hence, a future day is appointed for the delivery; and the fact is apparent that he did not obtain them, bearing the indorsement of the State, until a short time before their delivery. These facts may have excited the belief, that when he made the contract with the appellants, he had some arrangement by which he would obtain the bonds. But, would they probably divert and direct inquiry to the nature of that arrangement? Would they excite the suspicion of the most prudent, dealing in negotiable securities, that he intended acquiring them, or had acquired them, fraudulently, or illegally? We can not think the facts are sufficient to cast a shade on the transaction, so far as the appellants are concerned. It is only bad faith which will defeat their right to enforce the bonds against all parties to them.

10. The remaining question has been heretofore considered and decided by this court. The statute gave the State, for its protection and indemnity, a lien upon the property of the railroad company, having precedence and priority over all other liens, by way of mortgage or otherwise. The holders of the bonds of the company, indorsed by the State, to whom the State is liable upon its indorsement, upon default in the payment of the bonds, are entitled to be subrogated to the lien of

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the State. The subrogation is just and equitable, and is essential to render effectual the purposes of the statute in the creation of the lien—the protection and indemnity of the State. *Colt v. Barnes*, 64 Ala. 108; *Forrest v. Luddington*, 68 Ala. 1. The equity is worked out through and from the liability of the State; and if the liability does not exist, the equity does not arise.—*Bankhead v. Owen*, 60 Ala. 457; *Houston v. Br. Bank Huntsville*, 25 Ala. 250; *Grigsby v. Hair*, *Ib.* 327. And of consequence, it can not be claimed by a party who, in his transactions with the railroad company, has relieved the State from liability, though he may be entitled to enforce the subordinate mortgage the company may have executed.

There would be the difficulties attending the subrogation, suggested in the arguments of counsel, and pointed out by Mr. Justice BRADLEY, in *Branch v. Macon & Brunswick R. R. Co.*, 2 Woods, C. C. 385, if the State was pursuing the remedies given to it specially, and had possession of the property of the company. If a court were then to intervene—to intercept the remedies of the State, and to interrupt its possession—as it could intervene only at the instance of a party to whom the State was liable, or a party having a superior equity, there would be embarrassments arising from the incapacity of the State to be sued, and from other considerations, which this case does not involve. The constitution forbids the making of the State a party to suits in law or equity. It would be a harsh construction of the constitution, leading to the most inequitable consequences, that circumscribed the jurisdiction of the courts to determine controversies between individuals claiming rights, or asserting defenses, which must be traced to, or derived from the State. The incapacity of the State to be sued, as a general rule, is a sufficient reason for dispensing with its presence as a party.—*Davis v. Gray*, 16 Wall. 220; *Arlington case*, 3 Hughes (C. C.) 1; *Hagan v. Walker*, 14 How. 29.

The result is, that the City Court erred, in not decreeing the appellants were entitled to subrogation to the lien of the State, and, of consequence, to precedence and priority over the other holders of the bonds of the railroad company, who are entitled only to the security of the mortgage. The decree in this respect will be here reversed, reformed and corrected; otherwise affirmed, and remanded to the City Court for execution.

NOTE BY REPORTER.—On application for rehearing, by the counsel for Morton, Bliss *et al.*, the judgment rendered in this case, as indicated above, was set aside, and judgment rendered as follows: “It is considered that the decree of said City Court be reversed and annulled, and the cause be remanded to said

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City Court for further proceedings; and that the appellees pay the costs of this appeal, both in this court, and in said City Court "

Martin v. Hall.

Motion for Summary Judgment against Constable and Sureties on his Official Bond.

1. *Constable's bond ; secondary proof of.*—There is no statute requiring or authorizing the recording of a constable's bond, although it is required to be "approved by the judge of probate, and kept in his office" (Code, § 764); and without such statutory authority, the mere recording of it does not make the record competent evidence as a copy: to make such record admissible evidence, it must be proved to be a correct copy, after a proper predicate has been laid for the introduction of secondary evidence.

APPEAL from the Circuit Court of Jackson.

Tried before the Hon. H. C. SPEAKE.

This was a motion by William B. Martin, for a summary judgment against Thomas C. Hall and the sureties on his official bond as constable, "on account of the failure of said Hall to make the money on an execution in his hands as constable, in favor of said W. B. Martin, and against Jacob Houst" [or Honts], "issued on the 2d May, 1874, by J. J. St. Clair, justice of the peace, for \$24 debt, besides \$4 costs of suit; and which, by the use of due diligence, said Hall could have collected." The case was commenced in a justice's court, and was removed by *certiorari* into the Circuit Court, where the plaintiff filed a complaint, claiming \$28, with interest from May 2d, 1874, for the failure of said Hall, as constable, "to execute an order of sale issued on a judgment obtained before J. J. St. Clair, a justice of the peace." The defendants pleaded, "in short by consent, the general issue, with leave to give in evidence any matter which, if pleaded in full, would be a bar to this suit; and, 2d, not guilty;" and issue seems to have been joined on both of these pleas. On the trial, as the bill of exceptions shows, the defendants declining to admit the execution of an official bond by them as alleged, the plaintiff introduced John B. Tally as a witness, "who was the probate judge of the county, and the legal custodian of the records, books and papers belonging to the probate office, including the official bonds of constables, and who testified that, on that day, and on the preceding day,

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at the request of plaintiff's counsel, he had made diligent search in his office for the official bond of said Hall as bailiff, and had been unable to find any bond given prior to 1876; that he found one given in 1876, and another in 1878, but no other one; that it had been a custom of long standing in the probate office of said county, to keep a book known as the 'Bond Book,' in which were recorded all official bonds required by law to be kept on file in said office, including the official bonds of constables; that he then had in his custody, and in his office, said 'Bond Book' for 1873 and 1874, and in it he found the record or copy of a bond in words and figures as follows," setting it out. "Plaintiff then offered said record of said bond in evidence," but the court excluded it, on objection by the defendants, "because there was no law requiring the official bonds of constables to be recorded." Plaintiff excepted to this ruling, "and then offered said record of said bond as evidence tending to show that such a bond had been executed, and who the sureties thereon were, and what the condition of said lost bond was; but the court refused to admit it as evidence for said purpose, and the plaintiff duly excepted." These rulings of the court are now assigned as error.

ROBINSON & BROWN, R. C. HUNT, and WM. H. NORWOOD, for the appellant.

L. P. WALKER, and HUMES & GORDON, *contra*.

SOMERVILLE, J.—The court very clearly did not err in excluding from the jury, as evidence, the book produced from the office of the probate judge, purporting to contain a recorded copy of the official bond of Hall as constable. There is no statute which requires or authorizes constables' bonds to be *recorded* in the offices of probate judges. The statute merely prescribes that the original bond shall be "approved by the judge of probate, and *kept* in his office."—Code of 1876, § 764. In the absence of such a statutory requirement, the mere recording of a bond, or other instrument, does not make a copy of it evidence. The copy, to be admissible, must be shown to be correct, after laying the usual predicate for such secondary evidence, by proving the loss of the original, and the failure to find it after diligent search.—1 Greenl. Ev. § 91; 1 Whart. Ev. § 115. Or else a certified copy of the *original*, which is made by statute presumptive evidence in any civil cause, was required to be produced.—Code, 1876, § 3047.

Judgment affirmed.

[Sloan v. Frothingham.]

Sloan v. Frothingham.*Bill in Equity for Foreclosure of Mortgage, Account, etc.*

1. *Annuity to husband and wife during their joint lives, and to survivor for life, payable to husband "for their mutual benefit;" wife's interest in.* Where an annuity is created by deed, charged on lands, and secured by mortgage, in favor of husband and wife during their joint lives, and to the survivor for life, and is made payable to the husband "for their mutual benefit;" the husband does not take the entire interest during the joint lives of himself and wife, but he and his wife take by moieties; he receives and holds her portion as trustee for her, is liable to account to her for it, and can not make it his own, nor make an assignment or transfer which would affect her rights; and she has such an interest as entitles her to maintain a bill in equity to foreclose the mortgage, and to redeem from an older mortgage on the lands.

2. *Bill by husband and wife, and dismissal thereof by husband.*—A bill filed in the names of husband and wife jointly, to enforce payment of an annuity charged on lands, and made payable to the husband for the mutual benefit of himself and his wife during their joint lives, is the bill of the husband alone; and a dismissal of the bill by him, on compromise with the defendant, does not prejudice the rights of the wife, nor bar her from maintaining another bill to enforce payment of her part of the annuity.

3. *Sale under power in mortgage, by foreign administrator.*—A foreign administrator, who has not given bond and had his letters recorded here as required by statute (Code, §§ 2637-40), has no authority to execute a power of sale contained in a mortgage given to his intestate, as a domestic administrator may (*Ib.* § 2198); and a sale by him, under the power, neither cuts off the power of redemption, nor affects the right of a junior mortgagee to be let in to redeem.

4. *Same; ratification by heirs and domestic administrator.*—Though such sale is unauthorized and irregular, yet, if it is ratified by the heirs, next of kin and domestic administrator, and the proceeds of sale are properly applied by the foreign administrator in the due course of administration, the purchaser will be regarded as an equitable assignee of the mortgage and secured debt, and will be subrogated to the rights of the heirs and the domestic administrator.

5. *Sale under power in mortgage; effect as foreclosure; and ratification of irregular.*—A sale under a power contained in a mortgage, when valid and regular, is the equivalent of a decree of foreclosure in equity; and the same effect must be attributed to an irregular sale, when ratified by the parties in adverse interest. But a decree of foreclosure only binds the parties to the suit, and does not affect the rights of other persons; and the ratification of an irregular or unauthorized sale, by some of the parties in adverse interest, can not be allowed to prejudice the rights of the others.

6. *Ratification of unauthorized sale.*—It is a plain principle of right and justice, that where there is an unauthorized sale of property, real or personal, the owner can not take and hold the purchase-money, and yet reclaim the property; if, with knowledge of the facts, he elects to take the benefits of the sale, he can not afterwards repudiate it, to the injury

72	589
108	490
72	589
116	133
72	589
133	162
132	163

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of the purchaser; and this principle applies equally to void and voidable sales.

7. *Mortgagee's liability for rents and profits.*—A mortgagee, entering into possession before a foreclosure, under a sale which is either void or voidable, is accountable for the rents and profits actually received, and such as he might have received by the exercise of reasonable diligence.

8. *Removal of husband as wife's trustee.*—Where the husband has precluded himself from asserting his rights as trustee for his wife, and has abandoned her, taking up his permanent residence in a foreign country, a court of equity will remove him, at the instance of the wife, seeking to enforce her rights, and appoint another trustee for her.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. JOHN A. FOSTER.

The original bill in this case was filed on the 9th August, 1879, by Maria L. Sloan, the wife of Edward A. Sloan, against her said husband, James H. Frothingham, and several other persons; and sought to set aside a sale of certain real estate in the city of Montgomery, known as the "Belshaw corner," which had been made under a power contained in a mortgage executed by Robert R. Belshaw and James W. Powell to Charles B. Tatham, of New York; to have the property sold, in foreclosure and satisfaction of a junior mortgage, given by said Belshaw to the complainant and her said husband; also, an account of the rents and profits of the property while in the possession of the said Frothingham, the removal of said Edward A. Sloan as trustee for the complainant, and general relief.

The mortgage which the bill sought to have foreclosed, and a copy of which was made an exhibit, was dated March 7th, 1873, and recited as its consideration the compromise and settlement of a controversy which had existed between the complainant and said Robert R. Belshaw, respecting their interests in the said property; by the terms of which settlement, as reduced to writing and signed by both parties, the complainant and her husband conveyed to said Belshaw her interest in the property, and Belshaw agreed to charge it with the payment of an annuity in their favor. The stipulations as to the annuity were thus expressed in the instrument: "The parties of the second part [Belshaw and wife] covenant and agree to charge the aforesaid real property, for the payment well and truly to be made to the parties of the first part [Sloan and wife], with the sum of nine hundred dollars annually, from the first day of October, 1872; such annual payments being payable in equal semi-annual payments,—the first being payable October 1st, 1872, and the second on the 1st April, 1873, and on each succeeding first day of October and April, and so payable, in equal semi-annual payments, during their joint lives; and in the event of the death of the said Edward A. Sloan, before the death of said Maria L. Sloan, his wife, then and in that event

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for the payment to the said Maria L. of the sum of nine hundred dollars, payable semi-annually as aforesaid, during her life; but, should the said Edward A. survive his said wife, then for the payment to him, the said Edward A., of five hundred dollars annually during his life, in semi-annual payments as aforesaid; which payments, so herein provided to be made to the said Edward A. and Maria L. Sloan, shall, during their joint lives, be made to the said Edward, or his duly authorized agent thereunto appointed, for the mutual benefit of the said parties of the first part, as herein provided and contemplated; and in the event that the said Edward A. survive the said Maria L., then the sum herein provided to be paid to him shall be paid to him, the said Edward A.; and in the event that the said Maria L. shall survive the said Edward A., then the sum herein provided to be paid to her, in the event of survivorship, shall be paid to her. Which said charge shall be created by the said parties of the second part executing a mortgage on said real property, in compliance with the terms of this instrument," &c. The mortgage was given to secure the payment of this annuity as stipulated, and contained a power of sale on default.

The mortgage to Sloan and wife was, by its terms, made subject and subordinate to another mortgage already existing on the property, a copy of which was also made an exhibit to the bill; this being the mortgage under which the property was sold, and under which the defendant Frothingham claimed and held. This former mortgage was executed by said Robert R. Belshaw and James W. Powell and wife, to said Charles B. Tatham, of New York, to secure the payment of five promissory notes, falling due one, two, three, four and five years after date respectively, and amounting to about \$13,000; and was dated April 30th, 1860. "After the execution of said mortgage," as the bill alleged, "and before the sale had under it as hereinafter stated, said Powell transferred and conveyed to complainant and said R. R. Belshaw, by proper deed of conveyance, all his right, title and interest in said property upon his promise and agreement to pay said mortgage." Said mortgage was, as the bill further alleged, "on the 28th May, 1860, duly transferred, conveyed, and assigned in writing, by apt words of conveyance, by said Charles B. Tatham, to William H. Cary, since deceased, who departed this life, in the State of New York, in February, 1861." Letters of administration on said Cary's estate were granted, in New York, to Mrs. Maria Cary, his widow, and Isaac H. Frothingham; but they never had their letters of administration recorded here, or gave bond, as required by the statutes of Alabama.—Code, §§ 2637-40. On the 1st January, 1873, said New York administrators, "claiming and professing to act under said power of sale contained in

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said mortgage," sold the property, and it was bid off in the name of said James H. Frothingham as the purchaser. The administrators were not present at the sale, which was conducted by J. S. Winter as their agent and attorney, and the property was bid off by him, or at his instance, in the name of said James H. Frothingham, to whom a deed was afterwards executed by the administrators. Said Frothingham was put in possession of the property under his purchase, and continued in possession until July, 1879, when he sold and conveyed to James A. Farley and Moses Brothers, a partnership doing business in the city of Montgomery.

The bill alleged, also, that said Edward A. Sloan, on the 3d August, 1878, "filed a bill in this court similar to this bill, but, although he was trustee for complainant as herein shown, he filed said bill in his own name, making himself the only plaintiff, and your oratrix one of the defendants;" that he afterwards compromised and settled said suit, in consideration of money paid him by some of the defendants, dismissed the bill, and transferred all his right and interest in the annuity and mortgage to said James H. Frothingham; that he had abandoned the complainant, had not lived with her for several years, and contemplated a return to England, his native country, intending to take up his permanent residence there. It was alleged, also, that the payments made on the debt to Tatham, and the rents and profits of the property while in the possession of the several defendants, were sufficient to pay the debt secured by the mortgage to Tatham. James H. Frothingham, Robert R. Belshaw and wife, Charles Tatham, Edward A. Sloan, James A. Farley, the several partners composing the firm of Moses Brothers, Mrs. Maria Cary and Isaac Frothingham, individually and as administrators of the estate of said William H. Cary, were made defendants to the bill; the prayer of which was, that the sale under the mortgage to Tatham, and the conveyances to the subsequent purchasers, be set aside; that an account be taken of the rents and profits of the property while in the possession of the several defendants since the sale under the mortgage, and the amount be applied to the payment of any balance remaining due and unpaid on said mortgage debt; that the complainant's mortgage be foreclosed, the property sold, and the proceeds applied in satisfaction of the amount due her; that said Edward A. Sloan "be removed from the trusteeship of said property in this bill mentioned, and that complainant be permitted, by the decree of this court, to own, control, and dispose of said property as a *femme sole*;" and the general prayer, for other and further relief, was added.

A demurrer to the bill was filed by Edward A. Sloan, which the chancellor overruled; but he sustained a demurrer filed by

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the other defendants jointly. On appeal to this court, by the complainant, the chancellor's decree was reversed, and the cause was remanded, as shown by the former report of the case. *Sloan v. Frothingham*, 65 Ala. 593-99.

The bill was amended, after the remandment of the cause, by alleging that said New York administrators, prior to said sale under the power in the mortgage, had received partial payments from Belshaw on the mortgage debt, and were placed in possession of the premises by Belshaw, and received the rents for a long space of time; that they also received, of the purchase-money bid at the sale, the sum of \$17,244.90, being the whole amount bid except \$755, which was paid to Belshaw as the excess above the amount due on the mortgage debt; that these several sums were duly used in the course of administration by the New York administrators, and paid over and distributed among the heirs and distributees who resided there, and who were all of lawful age; that there were no heirs or distributees who resided in Alabama, and no creditors resident here; and that letters of administration on said Cary's estate had been duly granted by the Probate Court of Montgomery, since the filing of the original bill, to S. M. Levin, who was made a defendant. It was alleged, also, that said E. A. Sloan had carried out his intention of leaving the country, had deserted the complainant, and had taken up his permanent residence in England.

A cross-bill was filed by Robert R. Belshaw, alleging that said New York administrators had received, in addition to the \$17,244.90 of the purchase-money bid at the sale, large partial payments made by him, and the rents and profits of the property for a long space of time, and had duly accounted for all these sums to the distributees in New York; that he received from said administrators, or from their agent and attorney who conducted the sale, the sum of \$755.10, as the balance estimated to be due him after satisfying the mortgage, on the assurance of said agent and attorney that the sale was regular, legal and valid, and with the definite understanding that the purchase-money was to be applied to the payment and satisfaction of said mortgage debt; whereas, as he had learned within the last six months, said sale was made by said administrators without any authority, said mortgage was still uncanceled and unsatisfied, and the secured notes were still outstanding, still a subsisting liability against him, and an incumbrance on the mortgaged property. The prayer of his cross-bill was, "that said sale or pretended sale, made on or about the 26th May, 1873, under said power of sale contained in the said mortgage to Tatham, be set aside and annulled; that an account may be taken, under the direction of the court, of what may be due by your orator on said mortgage; that your orator may be credited, on such accounting, with the

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rents and profits arising from said mortgaged property since January 1st, 1873, or which should have been received if the same had been properly managed; and if, on said accounting, nothing is found due on said mortgage, that the same may then be ordered to be given up and cancelled; and if any balance is found due to your orator on such accounting, respondents may be decreed to pay the same. Or, if anything is found due on said mortgage, or on any other accounts growing out of the matters and things in this bill set forth, then your orator offers to pay the same, and prays that, when so paid, said mortgage may be ordered to be given up and cancelled;" and for other and further relief, under the general prayer.

By written agreement of counsel, filed of record in the cause, the following facts were admitted: "The transfer and conveyance by Powell and wife was to Robert R. Belshaw alone, and not to him and Mrs. Maria L. Sloan. The notes and mortgage to Tatham were regularly transferred and conveyed to W. H. Cary in his life-time, and to his heirs, executors, and assigns, by said Tatham. It is admitted that R. R. Belshaw did not have actual notice that no letters of administration on Cary's estate had been granted in Alabama to said Isaac H. Frothingham and Maria Cary, or that they had not had their New York letters of administration recorded in Alabama, and had not given bond here; but said Belshaw lived in the city of Montgomery, within a few hundred yards of the court-house, and had opportunity to find out before the sale of said mortgaged premises on 26th May, 1873; and said Belshaw was present at said sale. J. S. Winter, who acted as the attorney for said New York administrators at said sale, stated to said Belshaw, at and before the sale, that they had the right, under the power of sale contained in the mortgage to Tatham, to make the sale which was made on the 26th May, 1873. The sale was advertised to be made by said Frothingham and Mrs. Cary, as the administrators of W. H. Cary, under the power of sale contained in the mortgage to said Tatham. Said Winter had been the attorney of Belshaw, on various occasions, in 1870, '71, and '72, but was not his attorney at said sale on the 26th May, 1873, being then the attorney of said New York administrators; and in asking for a postponement of the sale, which had been advertised as early as March, 1873, said Belshaw was represented by J. Gindrat Winter and Jno. Gano Winter, who were never employed to contest said sale, nor advised with as to the validity of said sale. At the time of said sale, Isaac H. Frothingham was absent in Europe, and did not return until late in the summer, or early in the fall; and after his return, he gave his written approval of the sale, and, on the 15th November, 1873, he and Mrs. Cary executed and delivered to said James H. Frothingham, as

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the purchaser at said sale, a conveyance of said premises, as more fully stated in the answer of said Frothingham. Robert R. Belshaw received the rents and profits of the mortgaged premises, up to the sale on 26th May, 1873. At and before said sale, said Belshaw and Mrs. Sloan were occupying a part of the mortgaged premises, and they continued to occupy them for some time afterwards, free of rent, Mrs. Sloan so continuing until October 1st, 1875. Of the amount bid at the sale, \$755.10 was paid to said R. R. Belshaw, and the balance, \$17,244.90, was paid to said Isaac Frothingham and Mrs. Cary as administrators. The heirs and distributees of W. H. Cary, with full knowledge of the facts, ratified said sale of May 26th, 1873; and the money realized from said sale was distributed to them, as assets of the estate of said W. H. Cary, by said New York administrators; and the two payments made to said administrators, in 1867 and 1868, by said Belshaw, were likewise distributed amongst the heirs and distributees, with full knowledge of the source whence said moneys arose. Said E. A. Sloan and his wife both were living in Montgomery on the 26th May, 1873, as they had been for several years before; and they both knew of said sale when it occurred, and that James H. Frothingham was the purchaser at said sale. Edward A. Sloan conveyed to Moses Brothers, and not to James H. Frothingham. At the time said Sloan filed his bill, and at the time the decree was rendered thereon, he and his wife, the said Maria L., were living apart; and since the filing of the bill in this case, said Sloan has gone to Europe, with the intention of remaining, and he and the said Maria L. have lived separate since they separated, as set forth in the bill. Prior to the conveyance by said E. A. Sloan to Moses Brothers, the latter had arranged with Farley for the purchase of the property from James H. Frothingham. This agreement applies only to the hearing on the equities of the parties, and shall not interfere with any reference which may be ordered by the chancellor, if he so decrees."

On final hearing, on pleadings and proof, the chancellor dismissed the original bill, at the costs of the complainant or her next friend, and also dismissed the cross-bill of Belshaw, at his costs, but without filing any written opinion. From this decree Mrs. Sloan and Belshaw each appeals, and each assigns errors in this court; Mrs. Sloan assigning the dismissal of her bill, and Belshaw the dismissal of his cross-bill.

JNO. GINDRAT WINTER, with whom were CLOPTON, HERBERT & CHAMBERS, for Mrs. Sloan, one of the appellants.—1. The words "for the mutual benefit of the two," as used in the instrument creating the annuity, do not exclude the husband's marital rights as to the interest of the wife in the annuity and

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the mortgage security; and his marital rights not being excluded, the wife's estate is held under the statute.—*Brevard v. Jones*, 50 Ala. 221; *Conner v. Williams*, 57 Ala. 131; *Hooks v. Brewer*, 62 Ala. 260; *Miller v. Voss, Taylor & Co.*, 62 Ala. 122; *Mitchell v. Gates*, 23 Ala. 483; *Williamson v. Mason*, 23 Ala. 488; *Johnson v. Johnson*, 32 Ala. 637; *Geyer v. Br. Bank of Mobile*, 21 Ala. 414; *Lewis v. Eldridge*, 38 Ala. 17; *Huckabee's Adm'r v. Andrews*, 34 Ala. 646. But, however strong the words may be, as evidencing an intention to exclude the husband's marital rights, they would be treated as surplusage in a joint conveyance to husband and wife.—*Pollard v. Merrill*, 15 Ala. 729; *Walshall v. Goree*, 36 Ala. 729. At common law, such a conveyance would create a tenancy by entireties.—*Ewell's Lead. Cas. on Infancy and Coverture*, 488 *et seq.* It is unnecessary to consider what effect a sale of such an estate by the husband would have on the wife's interest; since the statutes have done away with such estates, and husband and wife are now made tenants in common as to such estates.—*Walshall v. Goree*, 36 Ala. 729.

2. It matters not, for the purposes of this suit, whether Mrs. Sloan's estate is equitable or statutory. She is entitled to protection against the marital rights of the husband; and if not protected by the instrument creating the estate, then the statute applies.—*Brevard v. Jones*, 50 Ala. 221; cases cited in 2 Brick. Digest, 91, § 272. If the instrument excludes the marital rights, she is protected, and the statute has no application.—Same authorities. Hence, the transfer of his interest by E. A. Sloan to Moses Brothers can not affect the interest of his wife, the complainant; and the dismissal of his bill can not prejudice her rights in this case.

3. The attempted foreclosure of the mortgage by the New York administrators, under the power of sale contained therein, was and is absolutely void as to Mrs. Sloan.—*Sloan v. Frothingham*, 65 Ala. 593. No act ratifying said sale, in which she did not participate, would bind her.—*Cook v. Tullis*, 18 Ala. 338; *Wood v. McCain*, 7 Ala. 806; *Foster v. Hogart*, 12 Q. B. 167; *Gardner v. Gardner*, 4 Illinois, 296; *Whitacre v. Fuller*, 5 Maine, 517; 1 Jones on Mortgages, § 732. A foreclosure in equity does not bind incumbrancers who were not parties to the proceedings.—2 Jones on Mortgages, §§ 1075, 1395; *Judson v. Emanuel*, 1 Ala. 601; *Cullum v. Batre*, 2 Ala. 420; *Br. Bank v. Taylor*, 10 Ala. 70; *Downs v. Hopkins, Allen & Co.*, 65 Ala. 510; *Kilgour v. Wood*, 64 Illinois, 346.

4. The purchaser at the sale having paid the purchase-money to the New York administrators, and they having duly applied the same by proper distribution among the heirs of their decedent, who were all of lawful age, and there being no creditors of

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the estate in Alabama; these facts operated as an equitable assignment of the mortgage and secured debt to said purchaser, but not as a confirmation of the sale on the part of this complainant.—*Robertson v. Ryan*, 25 N. Y. 320; *Brown v. Smith*, 16 Mass. 108; *Brobst v. Brock*, 10 Wallace, 519; *Gilbert v. Cooley*, Walker's Ch. 494; *Olmsted v. Elder*, 2 Sandf. N. Y. 325; *Moore v. Cord*, 14 Wisc. 213; *Stark v. Brown*, 12 Wisc. 573; *Johnson v. Robinson*, 34 Md. 167; *Jackson v. Bowen*, 7 Conn. 1; *Niles v. Ransford*, 1 Mich. 343; *Muir v. Berkshire*, 52 Indiana, 149; *Jones v. Mack*, 53 Mo. 147; *Russell v. Whitely*, 59 Mo. 196; *Cook v. Parham*, 63 Ala. 461; *Hatchett v. Berney*, 65 Ala. 39.

5. The purchaser at said sale, being only an assignee of the older mortgage, and having taken possession of the mortgaged property, became a mortgagee in possession without foreclosure, and as such liable to account to complainant, as junior mortgagee, for the rents and profits of the property, to be applied in satisfaction of the older mortgage.—Jones on Mortgages, §§ 1112, 1118; *Hogan v. Stone*, 1 Ala. 496; *Morrow v. Turney's Adm'r*, 35 Ala. 131; *Powell v. Williams*, 14 Ala. 476; *Toomer v. Randolph*, 60 Ala. 355; *Lovelace v. Webb*, 26 Ala. 271.

6. If the acceptance by the mortgagor of the surplus of the purchase-money at said sale, operating as a ratification, passed his equity of redemption to the purchaser, said purchaser became, after payment of the first mortgage, the owner of the entire estate, subject only to the complainant's mortgage. Ordinarily, when the two estates become united in one and the same person, the mortgage is merged; but equity will prevent a merger, to protect the owner against an intervening incumbrance.—Jones on Mortgages, § 848. Hence, the older mortgage was not merged, and the owner's possession must be referred to it, and not to the interest he acquired from the mortgagor; otherwise, this rule preventing the merger would be extended further than the principle requires, its purpose being to secure the payment of the mortgage debt before a second or intervening incumbrancer can subject the property; for "payment of the mortgage debt is the full measure of the right of the mortgagee in a court of equity."—*Downs v. Hopkins, Allen & Co.*, 65 Ala. 510. Hence, appellees can not say that they are not liable for rents, because they hold under the mortgagor, who was not liable for rents. But this is not an open question, since the universal doctrine is, that a first mortgagee in possession, although he has acquired the interest of the mortgagor, is liable to account at the instance of a second mortgagee.—*Ten Eyck v. Casad*, 15 Iowa, 524; *Johnson v. Harmon*, 19 Iowa, 60; *Barrett v. Blackmar*, 47 Iowa, 565; *Shaw v. Hoadley*, 8 Blackf. Ind. 165; *Murdock v. Ford*, 17 Indiana, 52; *Strange*

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v. Allen, 44 Illinois, 433; *Parker v. Childs*, 25 N. J. Eq. 41; *Swift v. Edson*, 5 Conn. 531; *Harrison v. Wyse*, 24 Conn. 1; *Cooper v. Martin*, 1 Dana, 23; *Haines v. Beach*, 3 John. Ch. 459; *Walsh v. Insurance Co.*, 13 Abb. Pr. 33.

GORDON MACDONALD, for R. R. Belshaw, one of the appellants.—1. The first point raised on the demurrer is settled by the decisions of this court in *Hatchett v. Berney*, 65 Ala. 39; and *Sloan v. Frothingham*, 65 Ala. 593.

2. Admitting that Belshaw is chargeable with notice of the illegality of the sale by the New York administrators, which this court has declared void (*Sloan v. Frothingham*, 65 Ala. 593), it is contrary to reason and justice, and against the highest authority, both English and American, State and Federal, to hold that such void sale, or any other void act, is capable of confirmation.—Bouv. Law Dic., tit. *Confirmation*, and authorities there cited; Bishop on Contracts, 707; *Pearsall v. Chaplin*, 44 Penn. 9; *McCracken v. San Francisco*, 16 Cal. 591; *Candee v. Burke*, 1 Hun, N. Y. 546; *Edmunson v. Montague*, 14 Ala. 370; *Swings Bank v. Dunklin*, 54 Ala. 471; *City of Eufaula v. McNab*, 67 Ala. 588; *Chambers v. Falkner*, 65 Ala. 488; *Cook v. Tullis*, 18 Wallace, 332; *Joiner v. Palmer*, 78 N. C. 196; *Pettit v. Pettit*, 32 Ala. 288; *Carrington v. Caller*, 2 Stew. 175. The acceptance of money under a void sale can not estop the party accepting it. "*Confirmatio est nulla, ubi donum precedens est invalidum; et ubi donatio nulla est, nec valebit confirmatio.*" And see *Candee v. Burke*, and *Chambers v. Falkner*, *supra*.

3. Whenever it is necessary to make title to lands through the official acts of an executor or administrator, it must be the act of an executor or administrator deriving authority from the *lex rei sitæ*, or recognized by that law. At the time of Belshaw's supposed ratification, there could have been no party with whom he could deal, either by direct contract, or by the implied contract of ratification.—*Kerr v. Moore*, 7 Wheat. 552; *Cutler v. Davenport*, 1 Pick. 81; *Hutchins v. State Bank*, 12 Metc. 424.

4. The proof shows that the money was accepted by Belshaw upon the representation to him by the attorney of the foreign administrators, who was also his attorney, that said foreign administrators were in fact entitled to it, and were the proper parties to receive the money. This was simply a mistake of fact. Money paid under a mistake of fact, though paid voluntarily, may be recovered back, even without a previous demand; and merely having the means of knowledge is not sufficient to prevent a recovery. Belshaw having accepted the money under these representations by the attorney of the New York ad-

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ministrators, who were in fact the sellers, a court of equity will set aside the sale, whether the representation was the result of fraud or mistake.—*Doggett v. Emerson*, 3 Story, C. C. 700; *Baines v. Barnes*, 64 Ala. 383; *Daniel v. Mitchell*, 1 Story, C. C. 172; *Warner v. Daniels*, 1 Wood. & M. 107; *Mason v. Crosby*, 2 Ib. 342; *Smith v. Babcock*, 2 Ib. 246; *James v. State Bank*, 17 Ala. 69.

THOS. H. WATTS, and TROY & TOMPKINS, *contra*.—1. The complainant's interest in the annuity is not an equitable separate estate, since there are no words in the instrument creating it which exclude the husband's marital rights: on the contrary, the instrument provides that the money shall be paid to the husband for the *joint* use and benefit of him and his wife, and thereby excludes the idea of any separate estate or interest in the wife.—*Bender v. Reynolds*, 12 Ala. 146; *Moss v. McCall*, 12 Ala. 630; *Pollard v. Merrill & Eximer*, 15 Ala. 169; *Mitchell v. Gates*, 23 Ala. 438; *Williamson v. Mason*, 23 Ala. 488; *Johnson v. Johnson*, 32 Ala. 637; *Lamb v. Wragg & Stewart*, 8 Porter, 73.

2. Nor is her interest a statutory estate. Such an estate is created by the law, and does not arise from the contracts of the parties; and the law has imposed upon it certain liabilities, from which it can not be freed by the acts of the parties, and has thrown around it certain restrictions and safeguards, which can not be disregarded or destroyed by the parties. The character of this estate, the nature of the liabilities to which it may be subjected, the restrictions imposed upon its alienation, and the respective interests of husband and wife in it and to it, during their joint lives, and on the death of either, are carefully defined and declared by the statute; and these provisions have been the subject of numerous adjudications by this court.—*Short v. Battle*, 52 Ala. 466; *Durden v. McWilliams*, 31 Ala. 438; *Lee v. Campbell*, 61 Ala. 12; *Lee v. Tanenbaum*, 62 Ala. 501; *O'Conner v. Chamberlain*, 59 Ala. 431; *Curdy v. Blue*, 62 Ala. 77; *Gilbert v. Dupree*, 63 Ala. 331; *Rogers v. Boyd*, 33 Ala. 175; *Eskridge v. Ditmars*, 51 Ala. 245; *Lobman v. Kennedy*, 51 Ala. 163. An attempt to apply these statutory provisions, as construed in these and other decisions of this court, to the interest which Mrs. Sloan takes in this annuity would be futile. The wife has no power to charge it at all, while the husband's power of disposition is unlimited and unrestricted, except that it must be used for the *mutual* benefit of himself and his wife. He may buy a pleasure carriage with it, or a piano, or any other article of comfort, pleasure, or convenience, which would not be considered necessities under the statute; or he might spend the entire amount each year in carrying on farm-

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ing operations for their joint benefit. The instrument does not limit the husband's power to mortgage the annuity, or to transfer or assign it, during the joint lives of himself and wife; and on his death intestate, the wife's interest in the annuity would not be estimated in ascertaining her distributive share of his estate. All these incidents clearly distinguish this from a statutory estate.

3. Being neither a statutory estate, nor an equitable separate estate, it necessarily follows that the common law must govern it; and at common law, the entire interest in an annuity so held vested absolutely in the husband, except as to the contingent interest of the wife dependent on her survivorship.—*Walshall v. Goree*, 36 Ala. 736; *Tyler on Infancy and Coverture*, 385; *Ames v. Norman*, 4 Sneed, 683; *Bishop on Married Women*, vol. 1, § 131.

4. Mrs. Sloan, then, during the life of her husband, has no interest in this annuity, for which she can maintain any suit, either at law or in equity. If she ever had any right or interest, she is barred by the decree dismissing her husband's bill, which is conclusive on her; and the transfer by her husband to Moses Brothers conveyed the entire interest.—*Aurand v. Aurand*, 21 Penn. St. 343; 4 *Wait's Actions and Defenses*, p. 570.

5. But, whatever may be Mrs. Sloan's rights or interest in the annuity, she is entitled to no relief, under the pleadings and admitted facts, as against the defendants who now hold and claim the mortgaged property. Although the sale by the New York administrators was made without authority of law, and was void for some purposes, it was capable of ratification.—*Story on Agency*, §§ 249-40; *Lamkin v. Reese*, 7 Ala. 70; *Handy v. Noonan*, 51 Miss. 166; *Forsythe v. Day*, 46 Maine, 176; *Maple v. Kussart*, 53 Penn. St. 348. A sale under the mortgage by Cary's heirs, the parties beneficially interested, would have cut off the equity of redemption, as effectually as a decree of foreclosure in equity.—*Childress v. Monette*, 54 Ala. 317; *McGuire v. Van Pelt*, 55 Ala. 344. The administrators were the mere trustees or agents of the heirs and distributees of the estate; and there being no debts against the estate, and the money having been paid over to the parties entitled to receive it, a domestic administrator would be enjoined from the assertion of his legal rights.—*Fretwell v. McLemore*, 52 Ala. 124; *Owens v. Childs*, 58 Ala. 113. When parties voluntarily do what a court of equity would compel them to do, the court will uphold and sanction it.—*Wilson v. Sheppard*, 28 Ala. 623.

6. Belshaw received the surplus of the proceeds of sale after satisfying the Tatham mortgage, with full knowledge of the facts; and this amounts to a ratification of the sale by him.

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Maple v. Kussatt, 53 Penn. St. 348; *Kyle v. Town of Yellowhead*, 80 Illinois, 208; *Snow v. Walker*, 43 Texas, 154; *Cady v. Owen*, 34 Vermont, 598; *Handy v. Noonan*, 51 Miss. 166. If there was any mistake, it was as to a matter of law, and does not authorize equitable relief.—*Townsend v. Cowles*, 31 Ala. 435. Neither his allegations nor his proof entitles him to any relief on the ground of fraud or mistake.—*Duckworth v. Duckworth*, 35 Ala. 70; *Flewellen v. Crane*, 58 Ala. 627; *Willingham v. Harrell*, 36 Ala. 583, *Bliss v. Anderson*, 31 Ala. 612; *Dill v. Camp*, 22 Ala. 249; Kerr on Fraud and Mistake, 298-9.

7. James H. Frothingham entered into possession under the mortgagor, and not as mortgagee; and neither he nor the subsequent purchasers from him can be charged with rents and profits, as mortgagees in possession, at the suit of junior mortgagees. Neither the mortgagor, nor assignee of the equity of redemption, can be held accountable for rents, until a receiver has been appointed, or his right has been in some other manner intercepted.—*Howell v. Ripley*, 10 Paige, 43; *Scott v. Ware*, 64 Ala. 174; *Coker v. Pearsall*, 6 Ala. 542; *Hutchinson v. Dearing*, 20 Ala. 798; *Fry v. Br. Bank*, 23 Ala. 770; *Walker v. King*, 44 Vermont, 601; *Cook v. Parkham*, 63 Ala. 456; *Renard v. Brown*, 7 Nebr. 449; 2 Jones on Mortgages, §§ 1070, 1118; *Hooper v. Wilson*, 12 Vermont, 695; *Mayo v. Fletcher*, 14 Pick. 525; *Bank v. Reid*, 8 Pick. 549.

BRICKELL, C. J.—The first question presented in the argument of counsel is, whether Mrs. Sloan has such an interest in the annuity payable to herself and husband during their joint lives, as entitles her to maintain a bill for the foreclosure of the mortgage given to secure its payment, and to redeem from the senior mortgage upon the same premises.

By the common law, obligations or promises for the payment of money to the wife, or to husband and wife jointly, made during coverture, on the death of the husband without having reduced them to possession, or without having done some act in disaffirmance of the right of the wife, survived to her, and she held them as against the claim of his personal representative.—1 Bright on Hus. & Wife, 38; 1 Bishop on Married Women, §§ 87-8. A note for the payment of money, payable to the husband and wife, secured by mortgage, on the death of the husband survived to the wife.—*Draper v. Jackson*, 16 Mass. 480. A bond given to husband and wife, for their maintenance during each of their lives, survives to the wife. And if in his own name the husband had taken a mortgage to secure the payment of the bond, on his death, without having disaffirmed the right of the wife, the mortgage enured to her

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benefit.—*Pike v. Collins*, 33 Maine, 38. Or, if, suing in their joint names, the husband recovered judgment on such bond, after his death, the wife could by *scire facias* revive and enforce it.—*Schoonmaker v. Elinendorf*, 10 Johns. 48. In all such obligations, or promises, the wife had a distinct, legal and beneficial interest, of which she could be divested only by some act of the husband in disaffirmance of it, and of appropriation to his exclusive use.—*Boret v. Spelman*, 4 Comst. 284. If the intervention of a court of equity was necessary to aid the husband, or his assignee, in reducing them to possession, the court would enforce the equity of the wife to a settlement, making for her the same provision which would have been made, if they had been *choses* in action accruing to her before marriage.—2 Story's Eq. §§ 1404–08. The only distinction, of substance, recognized between such *choses* in action, accruing to the wife after marriage, and *choses* in action accruing to her before marriage, was in the mode of suing at law for their recovery. In all actions upon the ante-nuptial *choses* of the wife, husband and wife must have joined; and the suit was essentially the suit of the wife, “for the thing in controversy was hers.” In suing upon her post-nuptial *choses* of this character, the husband could sue alone, or, at his option, join the wife; and if she was joined, her rights were precisely the same as her rights to her ante-nuptial *choses*.—1 Bishop on Married Women, § 92. The whole doctrine grew out of the common-law theory of the unity of the marriage relation—the incorporation of the legal existence of the wife into that of the husband, and her consequent incapacity to take and hold property. From that incapacity resulted the principle, that the husband was entitled to take and hold all chattels of which she was possessed at the time of marriage, or subsequently coming to her possession; and the right to make his own all her *choses* in action, by reducing them to possession. There was, however, in the wife a distinct, legal and beneficial interest, recognized by the common law, until it was defeated by the act of the husband.—*Richardson v. Daggett*, 4 Vermont, 334.

The constitution and the statutes have changed and superseded wholly the theory and principles of the common law, so far as they defined and established the relation of the husband to the property and rights of property of the wife; creating a new system, variant in its policy, and in all its provisions. The wife is recognized as a distinct legal person, with as full capacity to take and hold property and rights of property, as if she had not entered into the matrimonial union. In this respect, her legal existence is not lost, or merged in that of the husband.—*Walshall v. Gorve*, 36 Ala. 728; *Stone v. Gazzam*, 46 Ala. 274. The words of the statute are as broad and com-

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prehensive as could have been employed. "All property of the wife, held by her previous to the marriage, or which she may become entitled to after the marriage, in any manner, is the separate estate of the wife." The term "property," as employed in the statute, includes every right which the wife can have in and to things real or personal, things in possession or in action. In *Soulard v. United States*, 4 Peters, 511, it was said by C. J. MARSHALL, that as applied to lands, the term "comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which lie in contract; those which are executory; as well as those which are executed." And in *Jackson v. Howell*, 17 Johns. 283, it is defined as "the highest right a man can have to anything; being used for that right which one hath to lands or tenements, goods or chattels, which no way depend on another man's courtesy." When the statute is read and construed in the light of, and in connection with the common law, and the principles and policy it was intended to supersede, there can be no doubt that the term "property," as employed in the statute, comprehends every species of property, and every right of property, to which the marital rights of the husband would have extended, and which could have been converted from the property and right of the wife, into his property and right. In *Walshall v. Goree*, *supra*, it is said: "By this legislation, the one legal person of the common law has been resolved into two distinct persons, so far, at least, as the capacity of taking separate estates is concerned." The character of the property, or right of property, is not of importance; nor is it material whether it resided in the wife at the time of the marriage, or is subsequently acquired. If, in the creation of the right, there is not a limitation to the sole and separate use of the wife, the constitution and statutes intervene, and pronounce that it is her separate estate—that it is held by her freed from all right and claim of the husband—held as if she were not associated with him in marriage.

If the covenant for the payment of the annuity, and the obligation in the mortgage, had been payable to two distinct persons by name, there would be no doubt that they would have taken it by moieties, though an action at law for its recovery must have been in their names jointly. The statute converting the husband and wife into two distinct persons, as to property and rights of property, they take the annuity by moieties, as they would have taken if not married.—*Walshall v. Goree*, *supra*. It is unimportant, in any view of this case, whether, by the terms of this covenant and mortgage, an equitable separate estate is created. The rights of the wife are the same, whether her right is to be deduced from the terms of the covenant and mortgage, or from the operation of

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the constitution and statutes. The husband is clothed with the power to receive the annuity; but the power to make it his own by receiving is excluded. It is for "the mutual benefit" of himself and wife that he is authorized to receive it. If we regard the wife's interest in the annuity as her statutory estate, as trustee for the wife, the husband would have been entitled to receive it; and conferring the power in express terms, is the mere expression of the legal effect and operation, in this respect, of the covenant and mortgage. If regarded as an equitable separate estate, the husband would receive the annuity, charged with a trust to apply it to the benefit of the wife, as well as for his own benefit. In either case, upon receiving the annuity, he would become a trustee, and liable to account to the wife.

The assignment made by the husband is, in its terms, limited to his right and interest; was not intended to embrace more, and is incapable of operating upon or affecting the right of the wife. The indorsement, or the transfer in any mode, by one of several payees or obligees of an instrument, will not pass the title. The largest operation it can have is as an equitable assignment of the right of the assignor or indorser.—2 Parsons' Notes & Bills, 4.

2. The former suit was the suit of the husband only, not the suit of the wife. The decree rendered was not a decree upon the merits, but of dismissal, in pursuance of the agreement of the husband. The legal presumption is, that the husband had by agreement adjusted the matter in controversy, so far as he had rights or interests involved; and it would operate as a bar to another suit by him, founded on the claim he had adjusted. He was without power, by any settlement or adjustment, to extinguish the rights and interests of the wife, and there is no indication of any purpose on his part to affect them. *Michan v. Wyatt*, 21 Ala. 813; *Thomas v. James*, 32 Ala. 723.

3-4. The sale of the mortgaged premises by the personal representatives of Cary, deriving their appointment from a tribunal in New York, was not a valid execution of the power of sale contained in the mortgage executed by Belshaw and Powell to Tatham. It was inoperative to pass title to the purchaser, to cut off the equity of redemption of the mortgagor, or to impair the rights of junior mortgagees to be let in to redeem.—*Sloan v. Frothingham*, 65 Ala. 593. Irregular and unauthorized as was the sale, the money received having been properly applied by the personal representatives, and the domestic personal representative, with the heirs and next of kin, having ratified and confirmed it, the purchaser is entitled to subrogation to their rights. He is an equitable assignee of the mortgage, and of the mortgage debt. The purchasers from him succeed to his rights,

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and are entitled to the benefit and protection of the debt and mortgage.—2 Jones Mortgages, §§ 1678, 1903.

5. This, however, is as far as the ratification and confirmation can extend. If the sale had been regular—if it had been a valid execution of the power—it would have been the equivalent of a foreclosure under the decree of a court of equity. A foreclosure and sale, under a decree of a court of equity, would have affected and bound only the parties to the suit, not concluding or operating to the prejudice of those who were not parties. The title only of the parties would pass to the purchaser. The irregular, unauthorized sale is incapable of ratification or confirmation by the one party in interest, to the prejudice of others who do not join in it,—as incapable as would be a decree of foreclosure to bind parties not before the court. As to parties other than themselves, the ratification and confirmation of the sale by the personal representative, the heirs and next of kin of the assignee of the mortgage and mortgage debt, is *res inter alios acta*.—1 Jones Mortgages, § 732.

6. The sale was made with the knowledge, and if not with the expressed consent, certainly without the dissent of the mortgagor, Belshaw. He was not in ignorance, or under misapprehension, of any of the facts attending the sale, unless it was superinduced by his own neglect to make inquiry. For more than seven years there was, on his part, unqualified acquiescence in the sale. Whether, under these facts, he could not be deemed to have waived his right to avoid the sale, if a material question, would not be free from difficulty. There is more than the failure to dissent from, or object to the sale, at the time it was made, and continuous acquiescence in it. The surplus of the proceeds of the sale, after satisfying the mortgage debt, ascertained and computed by himself, upon an erroneous method (as it now seems) of calculating the interest, he received from the purchaser. It is a plain principle of right and justice, that if there is an unauthorized sale of property, real or personal, the owner can not take the purchase-money, and reclaim the property. The books abound with cases, in which courts of equity have precluded parties, who have adopted and ratified unauthorized sales, by receiving the whole or a part of the purchase-money, from setting them aside, to the prejudice of the parties from whom the money was received. In the application of this principle, no distinction is made between sales which are void, and sales which are voidable. The whole principle is, that the party had the right to repudiate, or to ratify the sale—to take its benefits, or reject them and its burdens. Electing to take the benefits, there would be gross injustice, if, to the injury of others, he were permitted at pleasure to question the validity of the sale,—to retract the assent which he had given to it.

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2 Smith's Lead. Cases, 770; *Goodman v. Winter*, 64 Ala. 434; *Pickens v. Yarborough*, 30 Ala. 408; *Merritt v. Horne*, 5 Ohio St. 307.

7. A mortgagee, entering into possession of the mortgaged premises before foreclosure, is accountable for the rents and profits he may receive, or which he could with reasonable diligence have received. The liability rests upon him, if he enters under a void or voidable sale.—*Bigler v. Waller*, 14 Wall. 297; *Childs v. Childs*, 10 Ohio St. 339. The purchase of Frothingham, at the unauthorized sale made by the personal representatives of Cary, when confirmed, operated simply a transfer of the mortgage and of the mortgage debt, and to these the purchasers from him were subrogated. While in possession, he, and the purchasers from him, can be regarded in no other light than as mortgagees in possession before foreclosure. Standing in that relation, taking the rents and profits in trust for their application to the payment of the mortgage debt, they must account for then to the junior mortgagees, having the equity of redemption.—*Childs v. Childs*, *supra*.

8. The right of the husband to receive the annuity was expressed to be for the "mutual benefit" of himself and wife. The moiety of the wife, as we have said, he would take and hold in trust that he would apply it to her benefit. Occupying to the wife this relation of trust and confidence, if he disclaimed the relation, or placed himself in such a condition that a fair and diligent execution of the trust is not to be expected from him, the power and duty of a court of equity to remove him is undoubted. *Perry on Trusts*, § 275. The abandonment of the wife, taking up a permanent residence in a foreign country, coupled with the assignment of his interest in the annuity, render the interference of the court necessary, the revocation of his authority to receive the moiety of the annuity to which the wife is entitled, and committing the authority to a trustee of the appointment of the court.

Without prolonging the further examination of the case, we are satisfied that Mrs. Sloan, as a junior mortgagee, should be let in to redeem, upon the payment of the senior mortgage debt, subject to a deduction of the net rents and profits received by the purchaser at the unauthorized sale of the mortgaged premises, or by his assignees, or which with reasonable diligence they could have received, and to the removal of the husband as trustee, and the appointment of a trustee to receive her moiety of the annuity payable during the joint lives of herself and husband. The decree of the chancellor, dismissing her bill, must be reversed, and a decree here rendered granting the relief indicated. The decree dismissing the cross-bill of Belshaw must be affirmed.

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ACCOUNT.

1. *Open account*.—A demand arising out of contract, the terms of which have not been agreed on between the parties, whether it consists of one item or more, is an open account, within the bar of the statute of limitations of three years; so, also, is a demand for personal or professional services rendered, the value of which can only be recovered on a *quantum meruit*; but a claim for money paid on request, under circumstances from which the law implies a promise to repay, is not an open account. *Gayle's Adm'r v. Johnston*, 254.
2. *Same; professional services of physician*.—A demand for professional services as a physician, rendered to the intestate in his lifetime, is an open account, when the value of the services was not agreed on between the parties; and the frequent expressions and declarations of the intestate, showing an anxiety that the claim should be paid, but not admitting an indebtedness in any particular sum, can not change the character of the demand. *Ib.* 254.
3. *Same; burial expenses*.—Burial expenses of the decedent, which necessarily devolve on his friends and relations before the grant of administration, are regarded as money paid on the request of the personal representative, and the law implies a promise on his part to repay it; and a claim for such expenses, so paid, is not an open account. *Ib.* 254.

ACTION.

1. *When action lies for money had and received*.—An action for money had and received is an equitable remedy, and lies whenever the defendant has received money which in good conscience he ought not to retain, and which, *ex æquo et bono*, belongs to the plaintiff. *P. & M. Insurance Co. v. Tunstall*, 142.
2. *Same; by mortgagor against mortgagee; lies when*.—When mortgaged property has been sold under a power in the mortgage, and the proceeds of sale have been paid to the mortgagee, an action of assumpsit lies against him, in favor of the mortgagor, to recover the surplus remaining in his hands after paying the mortgage debt and the reasonable costs. *Hayes v. Woods*, 92.
3. *Same; proof of partial payments; statute of limitations as defense*. In such action, a material issue is as to the correct balance due on the mortgage debt, and the amount of credits to which the mortgagor is entitled; and proof of items for goods or chattels delivered as partial payments can not be rejected, because an action to recover their value would be barred by the statute of limitations, when the statute is not pleaded. *Ib.* 92.

ACTION—*Continued.*

4. *Same*; *whether action lies against mortgagee or assignee.*—The action lies against the mortgagee, although he has paid the money over to the assignee, when it appears that he joined with the assignee in making the sale, collected the money as agent for him, the assignee being a non-resident, and knew that the mortgagor claimed that the debt was paid. *Ib.* 92.
5. *When action on the case lies.*—The principle is settled by repeated decisions, that an action on the case lies for the conversion, or illegal disposition of personal property, upon which the plaintiff had a mere lien, or equitable mortgage, on which he could not maintain an action of trover, trespass, or detinue. *Hurst & McWhorter v. Bell & Co.*, 336.
6. *Action against municipal corporation, for damages; notice of defect in street or side-walk.*—To maintain an action against a municipal corporation for damages, on account of injuries resulting from its failure to keep the streets and side-walks in proper repair, the plaintiff must aver and prove actual notice of the defect in the street or side-walk, or facts from which constructive notice will be inferred; and such constructive notice may be inferred from the notoriety of the defect, and its continuance for such length of time as to raise the presumption that the proper municipal officers did in fact know, or with due vigilance and care ought to have known it. *City Council of Montgomery v. Wright*, 411.
7. *Between innocent sufferers by wrongful act of third person, as between themselves.*—When one of two innocent persons must suffer from the tortious act of a third, he must suffer the consequences who gave the aggressor the means of doing the wrongful act. *Turner v. F linn*, 532.

ADVERSE POSSESSION.

1. *What constitutes.*—Although a deed may be necessary to show a valid title to land, it is not an essential element of adverse possession, which may be acquired and held under a sale of which there is no written evidence. *Dothard v. Denson*, 541.
2. *Same.*—Good faith in claiming possession and title is an indispensable element of adverse possession; but this does not imply or involve a belief on the part of the possessor in the strength or validity of his title. *Ib.* 541.
3. *Same.*—When a person enters into the possession of land as the tenant of another, or in subordination to the title of another, his possession does not become adverse as against that person, until there has been a disclaimer and disavowal of his title, and notice thereof brought home to him, either actual, or so open and notorious as to raise the presumption of notice; and this possession does not ripen into a title, unless continued subsequently, without interruption, for ten years. *Ib.* 541.
4. *Possession as evidence of title.*—A plaintiff in ejectment may recover upon proof of possession merely, as against an intruder or trespasser, or one who does not show a better right; but possession is presumed, in the absence of all evidence to the contrary, to be rightful, and in subordination to the true title; and the burden of proving it to be adverse, as against the owner of the legal title, is on the party asserting it. *Ib.* 541.
5. *Adverse possession; what is, and how proved.*—To constitute a right by adverse holding, under the statute of limitations, there must be an actual possession, open and notorious; proof of a recorded deed, executed more than ten years before the commencement of the suit, is not sufficient, without proof of possession taken and held under it. *Lipcomb v. McClellan*, 151.

ADVERSE POSSESSION—*Continued.*

6. *Declarations of person in possession of land.*—The declarations of a person in possession of land, as to the nature and character of his possession, are competent evidence in his favor; but his statements as to the person from whom he bought it, and as to the price paid, are merely narrative of a past transaction, and are not admissible as evidence. *Ib.* 541.
7. *Adverse possession, and color of title under deed.*—When a vendor conveys by deed lands particularly designated, or described by numbers, metes and bounds, the purchaser acquires title, or color of title, only to the lands within the designated numbers and boundaries; and if he claims adverse possession, under color of title, of adjoining lands outside of those numbers and boundaries, because his vendor was in possession thereof at the time his conveyance was executed, he must show that the possession thereof was delivered to him, as a part of the lands sold and conveyed; otherwise, he can not tack his vendor's prior possession to his own subsequent possession, for the purpose of making out a title under the statute of limitations. *Humes v. Bernstein*, 546.
8. *Proof and effect of acts of ownership.*—On the question of adverse holding, or of asserted claim of right, acts of ownership are legal evidence to go before the jury; but they are not the equivalent of a claim of right, which is a conclusion of fact to be drawn by the jury from all the evidence, under appropriate instructions. *Ib.* 546.
9. *Effect of adverse possession on conveyance.*—To avoid a conveyance of lands made by one who is out of possession, on the ground of adverse possession in another, it is not necessary that the adverse possessor should have color of title, nor is it sufficient to show only the exercise of acts of ownership by him; to avoid the conveyance, he must be in adverse possession, "exercising acts of ownership, and claiming to be rightfully in possession." *Ib.* 546.
10. *Judicial sales; not affected by adverse possession.*—A judicial sale—that is, a sale made by a public officer, under legal process—is not within the doctrine against maintenance, and its validity is not affected by the fact that the land is at the time in the possession of a third person, claiming adversely to the defendant in the process. *Ib.* 546.
11. *Possession as evidence of title, and protection to possessor against subsequent incumbrance.*—The open, notorious, and exclusive possession of land by a purchaser, claiming it as his own, whether in trust or otherwise, is constructive notice to all the world of his title, whether it be legal or equitable; and he is entitled to protection against a mortgage subsequently executed by his vendor, and against any one claiming under such mortgage. *Sawyers v. Baker*, 49.
12. *Tax-sale; deed to purchaser, as color of title.*—When lands are sold for unpaid taxes, the deed to the purchaser, though it may be invalid as a conveyance of the title, is color of title, when possession has been taken and held under it; and is admissible as evidence for the grantee, or one holding under him, to show the extent of the possession according to the boundaries therein described. *Storall v. Fowler*, 77.

AGENCY.

1. *Ratification of agent's unauthorized act.*—An exchange of a mule for a horse having been made without authority by an agent, a claim and assertion of right and title to the horse by the principal, made with knowledge of the facts, is a ratification of the unauthorized exchange, and is irrevocable. *Atkinson v. Jones*, 248.

AGENCY—*Continued.*

2. *Agent's authority to collect or retain.*—An agent of an insurance company, having authority to settle a policy of insurance on the life of a deceased person, whose estate is insolvent, has implied power to retain for a debt due from the decedent to the company, when the administrator offers to allow it. *Life Association of America v. Neville*, 517.
3. *Agent's admissions or declarations; when admissible as evidence against principal.*—The admissions or declarations of an agent are admissible as evidence against his principal, only when made in the discharge of his duties as agent, and so closely connected with the main transaction in issue as to constitute a part of the *res gesta*. *Ala. Gr. So. Railroad Co. v. Hawk*, 112.
4. *Declarations of conductor and engineer; when admissible against railroad company.*—In an action against a railroad company, to recover damages for personal injuries sustained by a passenger, a witness for the plaintiff can not be allowed to testify, that the conductor, "a few minutes after the plaintiff had been hurt, asked the engineer why he did not respond to the bell-call; and that the engineer answered, he did respond to all the bell-call he heard." *Ib.* 112.

AMENDMENT.

1. *Of complaint.*—In a statutory action in the nature of ejectment, if the plaintiff, being the holder of the legal title, is described in the summons and complaint as suing for the use of another, these words may be struck out, by amendment, as surplusage. *Dane v. Glennon*, 160.
2. *Of summons.*—In determining when the action was commenced, the date or form of the summons is not conclusive, it being amendable in these particulars on proper evidence. *Ala. Gr. So. Railroad Co. v. Hawk*, 112.
3. *Amendment of verdict.*—A general verdict is always sufficient, when it responds in substance to every material fact involved in the issue; and the court may put it in proper form, with or without the consent of the jury; but, when the verdict is defective in substance, the court has no power to amend it, but should send the jury back for further deliberation; and if it is received, and the jury discharged, the court has no power to convene the jurors on a subsequent day, and let them perfect it. *St. Clair v. Caldwell & Riddle*, 527.
4. *Same.*—In detinue, or the corresponding statutory action for the recovery of personal property in specie, brought by two plaintiffs suing jointly, both must recover, or neither can; and a claim to the property being interposed by a third person, a verdict in favor of one of the plaintiffs only is defective in substance, and can not be amended by the court; nor can it be amended by the jury, on a subsequent day, after they have been discharged. *Ib.* 527.
5. *Amendment of judgment nunc pro tunc.*—At common law, a judgment could not be amended after the expiration of the term at which it was rendered; and while the statutory provisions authorizing the correction of errors or mistakes after the expiration of the term, on record or quasi-record evidence (Code, § 3154), have been liberally construed, they are confined to clerical errors or mistakes, leaving judicial errors to be corrected by appeal. *Whorley v. M. & C. R. R. Co.*, 20.
6. *Same; what are clerical errors.*—In the entry of a final judgment against a garnishee, it is the duty of the clerk to recite the fact and amount of the original judgment against the defendant; and his failure to do so is a clerical error, which may be corrected *nunc pro tunc* at a subsequent term. *Ib.* 20.

AMENDMENT—Continued.

7. *Amendment of final decree, at subsequent term.*—While clerical errors may be corrected at a subsequent term, the sentence and judgment of the court—that which has been deliberately ordered and adjudged in the final decree—can not be changed or modified at a subsequent term; and this is as true of that part of the decree which adjudges the costs, as of any other part. *Ex parte Robinson*, 390.
8. As to amendments in chancery, see title CHANCERY, 92.

ANNUITY.

1. *To husband and wife during their joint lives, and to survivor for life, payable to husband "for their mutual benefit;" wife's interest in.* Where an annuity is created by deed, charged on lands, and secured by mortgage, in favor of husband and wife during their joint lives, and to the survivor for life, and is made payable to the husband "for their mutual benefit;" the husband does not take the entire interest during the joint lives of himself and wife, but he and his wife take by moieties; he receives and holds her portion as trustee for her, is liable to account to her for it, and can not make it his own, nor make an assignment or transfer which would affect her rights; and she has such an interest as entitles her to maintain a bill in equity to foreclose the mortgage, and to redeem from an older mortgage on the lands. *Sloan v. Prothingham*, 589.

ASSIGNMENT.

1. *Assignment of promissory note by separate writing.*—As between the assignor and assignee, a valid assignment of a promissory note may be made by a separate instrument of writing, without indorsement or delivery of the note, and without notice to the maker; and an antecedent debt, or existing liability, is a sufficient consideration to support such assignment. *P. & M. Insurance Co. v. Tunstall*, 142.
2. *Same; when note is held by adverse claimant.*—Such an assignment, transferring the entire interest in the note, is not contrary to public policy, nor void for maintenance or champerty, because the note is at the time in the hands of a third person, claiming adversely to the assignor, or as collateral security for a debt due from him; but, until notice of the assignment is given to the maker and holder, all dealings between them and the assignor in reference to the note, if made in good faith, and for valuable consideration, will be protected. *Ib.* 142.
3. *Assignment of unplanted crops.*—At common law, unplanted crops, or other things not having an existence, actual or potential, were not the subject of sale, assignment, or mortgage; but, in a court of equity, such sale, assignment or mortgage creates an equitable interest, which attaches to the property when it comes into existence, or is acquired, and which the court will enforce and protect against all other persons than *bona fide* purchasers without notice; and for the conversion or illegal disposition of the property, with notice of the lien, an action on the case may be maintained. *Hurst & McWhorter v. Bell & Co.*, 336.
4. *Assignments of policy of life-insurance; garnishment against first assignee, after assignment of surplus.*—The holder of a policy of life-insurance having transferred it as collateral security to one of his creditors, and afterwards assigned his interest in the residue to a second creditor, other creditors can not, by garnishment subsequently sued out against the first assignee, reach the surplus remaining in his hands after the secured debts have been paid; nor

ASSIGNMENT—*Continued.*

- can they maintain a bill in equity, the money having been paid into court by the garnishee, to compel the second assignee to exhaust other securities held by him before resorting to the surplus. *Henderson v. Ala. Gold Life Ins. Co.*, 52.
5. *Election by creditor, to take under or against assignment.*—A creditor, secured by an assignment of property voluntarily executed by the debtor, may elect whether he will accept its provisions, or will assert his rights independent of it; but he must accept or reject it as an entirety, and can not accept it in part and repudiate it in part—he can not claim both under and against it. *Hatchett v. Blanton*, 423.
 6. *Same.*—A general recital in the assignment, that it is the purpose and intention of the grantor to appropriate the property assigned to the payment of partnership and individual debts as a court of equity would marshal the assets, does not authorize the court, at the instance of a secured creditor, to change or subvert the uses expressly declared, and to appropriate property to the payment of partnership debts, on the ground that it is in fact partnership property, when the deed treats it as individual property, and directs its appropriation first to the payment of individual debts. *Ib.* 423.

ATTACHMENT.

1. *What demands may be reached by garnishment.*—The principle is well settled, that only such debts or money demands can be reached by garnishment, as the defendant himself might recover by action of debt, or *indebitatus assumpsit*, in his own name; and when the defendant has no such cause of action, the plaintiff in the process can assert no better right, unless he can show some fraud or collusion, by which his legal rights are prejudiced. *Alexander v. Pollock & Co.*, 137.
2. *Same.*—Where the garnishees answer, that the defendant is in their employ as a clerk, at an agreed compensation of \$25 per week, payable in advance, and so paid at the beginning of each week, each party reserving the privilege of terminating the contract at any time without cause, there is no liability which can be reached by the garnishment; and the fact that this contract was made, on the service of the garnishment, with the intent, on the part of the debtor, to defeat the garnishment proceedings, does not render the garnishees liable, when it does not appear that they participated in his fraudulent intent, and he refused to continue in their employment under the former contract between them, by which his wages were payable monthly in advance. *Ib.* 137.
3. *Same.*—Proceedings by attachment and garnishment, in courts of law, are purely of statutory origin, and can operate only on the legal rights of the defendant in attachment—that is, such rights as he could enforce by action at law in his own name; and money in the hands of a garnishee can not be reached, unless the defendant himself could recover it of the garnishee by action of debt or *indebitatus assumpsit*.—*Henderson v. Ala. Gold Life Ins. Co.*, 32.
4. *Same; assigned policy of life-insurance.*—The holder of a policy of life-insurance having transferred it as collateral security to one of his creditors, and afterwards assigned his interest in the residue to a second creditor, other creditors can not, by garnishment subsequently sued out against the first assignee, reach the surplus remaining in his hands after the secured debts have been paid; nor can they maintain a bill in equity, the money having been paid into court by the garnishee, to compel the second assignee to exhaust other securities held by him before resorting to the surplus. *Ib.* 32.

ATTACHMENT—Continued.

5. *Levy of attachment on land; death of defendant before judgment.*
When an attachment is levied on lands, the death of the defendant before judgment dissolves the attachment, and destroys the lien; and though the action is revived against the administrator, and judgment recovered against him, the lands can not be sold under execution issued on it. *Lipscomb v. McClellan*, 151.
6. *By whom issued.*—A notary public, who is also *ex officio* a justice of the peace, has no power or authority to issue an attachment returnable to the Circuit Court. *Nordlinger v. Gordon*, 239.
7. *Judgment against garnishee; recital of judgment against defendant.*
A garnishment on a judgment being consequential and auxiliary only, the final judgment against the garnishee must recite the fact and amount of the judgment against the original defendant. *Whorley v. M. & C. Railroad Co.*, 20.
8. *Same; amendment of judgment.*—In the entry of a final judgment against a garnishee, it is the duty of the clerk to recite the fact and amount of the original judgment against the defendant; and his failure to do so is a clerical error, which may be corrected *nunc pro tunc* at a subsequent term. *Ib.* 20.

ATTORNEY AT LAW.

1. *Attorney's lien.*—The lien of an attorney at law, for his stipulated or reasonable fee, is limited to the judgment recovered in the particular case in which his services were rendered; and it does not extend to lands, or other like property of the client, which is the subject-matter of the litigation. *McWilliams v. Jenkins*, 430.
2. *Purchase by attorney, at sale under execution in favor of client.*—An attorney, having recovered a judgment for his client, and having the control thereof, can not, without the consent of his client, express or implied, become the purchaser of lands at a sale under execution issued thereon; and if he does so purchase, he becomes, like any other agent, a trustee for his client. Such a trust arises by operation of law, and continues until barred by lapse of time, or until terminated by an election to ratify the purchase, thereby giving it validity. *Pearce v. Gamble & Bolting*, 341.
3. *Same; when receiver may enforce such implied trust.*—A receiver, appointed by the Chancery Court, succeeding to all the rights and remedies of the client, and authorized to sue, may file a bill to enforce this implied trust against the attorney; and the *onus* is on the attorney to show that the right has been lost by *laches*, or that the purchase has been ratified. *Ib.* 341.

BAILMENT.

1. *Conversion by bailee; when bailor can sue.*—If the hirer of a mule exchanges the animal for another during the term, without the consent or authority of the owner, this is a conversion, for which the owner may at once terminate the bailment; and he may sue for his mule before the expiration of the term of hiring. *Atkinson v. Jones*, 248.

BASTARDY.

1. *Nature of proceeding.*—A prosecution under the statute relating to bastardy (Code, §§ 4071-93) is neither strictly civil nor strictly criminal, but partakes of the nature of both, and is rather of a quasi-criminal character. *Dorgan v. The State*, 173.
2. *Challenge of jurors; how many allowed.*—The statute does not prescribe the number of peremptory challenges, to which the defend-

BASTARDY—Continued.

- ant shall be entitled; and he can not complain that he was allowed only four challenges, as in civil cases, instead of six, as in criminal cases. *Ib.* 173.
3. *Proof that prosecutrix is an unmarried woman.*—When the complaint, being in proper form, and under oath, alleges that the prosecutrix is a single woman, the truth of that allegation is necessarily a part of the issue to be tried; and on the issue made up under the direction of the court, "as to who was the real father of the child mentioned in the complaint," the jury having returned a verdict against the defendant, finding that he was the father of the child, this court will not reverse the judgment, because the record does not affirmatively show that proof was made of the fact that the prosecutrix was a single woman. *Ib.* 173.
 4. *Jurisdiction of justice; former acquittal.*—In a prosecution for bastardy (Code, §§ 4071-80), the justice of the peace, before whom the complaint is made, has no more power to render a final judgment of acquittal, than a judgment of conviction; and if he finds from the evidence adduced that there is not probable cause to believe that the defendant is the father of the child, and therefore discharges him, such discharge can not be pleaded in bar of another prosecution. *Nicholson v. The State*, 176.
 5. *Relevancy of suspicious circumstances, implying admission or consciousness of guilt.*—In a prosecution for bastardy, the defendant denying that he had sexual intercourse with the prosecutrix at the time alleged by her, but admitting that he then had opportunities for such intercourse, and that he had intercourse with her at a subsequent time; the fact that, during the woman's pregnancy, which was well known in the neighborhood, he made inquiries and offers to pay for the means of making a woman miscarry, is relevant and competent evidence against him, though he professed to make such inquiries and offers for another person. *Ib.* 176.

BILL OF EXCEPTIONS.

1. *General exception to entire charge.*—A general exception to an entire charge, containing several separate and separable clauses, some of which are correct, can not be sustained; the particular clauses, supposed to contain error, should be specifically excepted to. *Farley v. The State*, 170.
2. *General exception to charges given or refused.*—A general exception to several charges given can not be sustained, unless each of them is erroneous; and in like manner, a general exception to the refusal of several charges asked can not be sustained, unless each one of them embodies a correct legal proposition applicable to the evidence. *Stovall v. Fowler*, 77.
3. *Conflict between judgment-entry and bill of exceptions.*—When there is a conflict between the judgment-entry and the bill of exceptions, as to matters of which the latter should properly speak, its recitals must control those of the judgment-entry. *Hurst & McWhorter v. Bell & Co.*, 336.

BILLS OF EXCHANGE, AND PROMISSORY NOTES.

1. *Assignment of promissory note by separate writing.*—As between the assignor and assignee, a valid assignment of a promissory note may be made by a separate instrument of writing, without indorsement or delivery of the note, and without notice to the maker; and an antecedent debt, or existing liability, is a sufficient consideration to support such assignment. *P. & M. Insurance Co. v. Tunstall*, 142.
2. *Same; when note is held by adverse claimant.*—Such an assignment, transferring the entire interest in the note, is not contrary to pub-

BILLS AND NOTES--*Continued.*

lic policy, nor void for maintenance or champerty, because the note is at the time in the hands of a third person, claiming adversely to the assignor, or as collateral security for a debt due from him; but, until notice of the assignment is given to the maker and holder, all dealings between them and the assignor in reference to the note, if made in good faith, and for valuable consideration, will be protected. *Ib.* 142.

3. *Promissory note; time of payment omitted or uncertain; parol evidence in aid of.*—A promissory note ought, regularly, to express on its face the time at which it is payable; and if no time is expressed, or plainly manifested, and a blank is not left for the insertion of a day of payment at the option of the payee, resort may be had to extrinsic evidence, showing the circumstances under which the note was executed, and the design of the parties in executing it, in order to explain an evident omission, and to fix the time at which it was intended to make the note payable. *Boykin v. Bank of Mobile*, 262.
4. *Same.*—A promissory note payable “*seventy-five after date*,” negotiable and payable in bank, and proved to have been made for the accommodation of the payees, who were commission-merchants in Mobile, to aid them in their business, and delivered to them by the maker, construed to be payable *seventy-five days* after date; and parol evidence was held admissible, in aid of the evident omission, showing the character of negotiable paper, as to length of time of maturity, which the banks in the city would accept. *Ib.* 262.
5. *Transfer of negotiable note as collateral security; rights of holder, and defenses by maker.*—A creditor, receiving negotiable paper as collateral security for the payment of a pre-existing debt, is not regarded as having acquired it for a valuable consideration in the usual course of trade, and is not entitled to protection against equities and defenses on the part of the maker of which he had no notice; and under the decisions of this court, contrary to the weight of authority, accommodation paper is not an exception to this rule. *Ib.* 262.
6. *Same.*—To constitute a purchaser for value, of notes or paper agreed to be transferred as collateral security for a debt contemporaneously contracted, it is not necessary that the notes or paper should be particularly described at the time; when the securities are subsequently transferred, in execution of the agreement, it is rendered specific and certain, and the creditor becomes a holder for value. *Ib.* 262.
7. *Relevancy of evidence as to terms of agreement for transfer of note as collateral security.*—In an action against the maker of a negotiable promissory note, proved to have been given for the accommodation of the payees, and by them transferred to the plaintiff bank as collateral security for a loan; the defense being want of consideration, and the terms of the agreement for the transfer being controverted—whether it was subsequent to the loan, or was made under an agreement contemporaneous with the loan; the fact that no portion of the money loaned was drawn out of the bank until after the transfer of the note, is relevant and competent evidence for the plaintiff. *Ib.* 262.
8. *When note or bill operates as payment.*—The giving by a debtor of his own bill or note, though negotiable, does not operate to discharge the debt, unless it is accepted as an absolute payment; but, while it is regarded, *prima facie*, as only collateral or additional security, all the authorities concur that, by express agreement, it may be regarded as a satisfaction and a bar. *Keel v. Larkin*, 493.
9. *Same.*—The English cases require an express agreement, unless the bills received have been negotiated, and are outstanding against

BILLS AND NOTES—*Continued.*

the defendant; but the modern American authorities, viewing it as a question of intention, hold that an implied agreement, to be determined by the jury from a consideration of all the facts, may have the same effect; and this is adopted by this court as the correct rule. *Ib.* 493.

10. *State's liability as indorser of railroad bonds.*—The State being an accommodation indorser of railroad bonds, and the company having transferred its bonds to the contractor engaged in the construction of the first twenty miles of its road, and, after procuring the State's indorsement on the completion of said twenty miles, again delivered them to him in payment of the company's debt to him; such use of them being unauthorized, and fraudulent as against the State, no liability rested on it by virtue of its indorsement, while the bonds remained in the hands of said contractor, or were in the hands of any other person chargeable with knowledge of the misapplication. *Gilman, Sons & Co. v. N. O. & S. Railroad Co.*, 566.
11. *Same; rights of bona fide holder.*—But, such indorsed bonds being negotiable instruments, and governed by the same rules as all other commercial paper, the State would become liable, as an accommodation indorser, to any *bona fide* holder who acquired them for value, in the usual course of business, without knowledge or notice, actual or constructive, of the misapplication by the company or its immediate transferee. *Ib.* 566.
12. *Same; burden of proof as to character of transfer.*—When a subsequent holder of such bonds seeks to enforce the State's liability as indorser, the original misappropriation of them being shown, the law casts on him the burden of proving that he acquired them in good faith, for value, and in the usual course of business. *Ib.* 566.
13. *Same; what is purchase for value, and in usual course of business.* The sale or exchange of such indorsed bonds for shares of stock in another railroad corporation, or in a joint-stock company or corporation engaged in the business of constructing railroads by contract, is an ordinary commercial transaction; and in determining whether the purchase is for value, the safer doctrine is, when no question of usury is involved, that the amount of the consideration, value being parted with, is only material as bearing on the question of notice. *Ib.* 566.
14. *Same; proof of notice, or want of notice.*—In such case, the presumption is of a want of notice, since it is not probable, though possible, that notice of the original fraud or illegality would be communicated to a subsequent holder, thereby defeating the transfer; and the burden of proving notice resting on the party who assails the title of the holder, it is not enough to show only that he acquired the bonds under circumstances which would have excited, in the mind of a prudent man, suspicions as to the title of the party from whom he purchased. *Ib.* 566.

BILL OF PARTICULARS.

1. *How made part of record.*—"A list of the items composing the account sued on" (Code, § 2984), like a bill of particulars at common law, is not a part of the record, unless made so by bill of exceptions; and when not so presented, it cannot be considered by this court for any purpose. *Hayes v. Woods*, 92.

BONDS.

1. *Appeal or writ of error bond in Federal courts; costs recoverable on affirmance, though bond not operative as supersedeas.*—In an action on an appeal or writ of error bond, given on the removal of a judge

BONDS—Continued.

ment from a Circuit Court to the Supreme Court of the United States, and conditioned that the appellant or plaintiff "shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good" (U. S. Rev. Stat. §§ 1,000 *et seq.*), although the bond may not operate as a *supersedeas* of the judgment, a recovery may be had for the costs of the appeal, if the judgment is affirmed. (*Crowder v. Morgan*, 535.

2. *Same; when operative as supersedeas.*—Under the United States statutes regulating writs of error and appeals (Rev. Stat. §§ 1,000 *et seq.*), as judicially construed by the Federal courts, the bond does not operate as a *supersedeas* of the judgment, unless it is approved by a justice or judge of the Circuit Court, and a copy of the writ of error is deposited, for the adverse party, with the clerk of said court. *Id.* 535.
3. *Constable's bond; secondary proof of.*—There is no statute requiring or authorizing the recording of a constable's bond, although it is required to be "approved by the judge of probate, and kept in his office" (Code, § 764); and without such statutory authority, the mere recording of it does not make the record competent evidence as a copy: to make such record admissible evidence, it must be proved to be a correct copy, after a proper predicate has been laid for the introduction of secondary evidence. *Martin v. Hall*, 587.
4. *Administrator's official bond; limitation of action against sureties.* Under the statute which prescribes six years as the limitation of "actions against the sureties of executors, administrators or guardians, for any misfeasance or malfeasance whatever of their principal, the time to be computed from the act done or omitted by their principal which fixes the liability of the surety" (Code, § 3226, subd. 7); the word *actions*, being liberally construed, includes a summary execution against the surety, on the return of "No property found" on an execution issued on a decree against his principal; the statute begins to run from the rendition of the decree against the principal; and when the decree is revived, no execution having issued on it before revivor, the statute is available to the sureties as a defense against a summary execution on the revived decree, issued more than six years after the rendition of the original decree. *Martin v. Tally*, 24.
5. *State-indorsed railroad bonds; bonds for first twenty miles of road.* Under the act approved February 21st, 1870, entitled "An act to furnish the aid and credit of the State of Alabama for the purpose of expediting the construction of railroads" (Session Acts 1869-70, pp. 149-57), it was contemplated that the first twenty miles of the railroad should be completed and equipped from the resources of the corporation, before any of its bonds should be indorsed by the State, and that the indorsed bonds should be used and applied in the further construction of the road; and the bonds referring on their face to the statute under which they were indorsed, every person taking them from the railroad company was put on inquiry, and was chargeable with notice of the requirements of the statute, of the relation of the State as indorser, and of the uses and purposes for which the company could legally transfer them. *Gilman, Sons & Co. v. N. O. & S. Railroad Co.*, 566.
6. *Same; misapplication of said bonds.*—The company having transferred its bonds to the contractor engaged in the construction of the first twenty miles of its road, and, after procuring the State's indorsement on the completion of said twenty miles, again delivered them to him in payment of the company's debt to him; such use of them being unauthorized, and fraudulent as against the State, no liability rested on it by virtue of its indorsement, while the

BONDS—*Continued.*

- bonds remained in the hands of said contractor, or were in the hands of any other person chargeable with knowledge of the misapplication. *Ib.* 566.
7. *Same; rights of bona fide holder.*—But, such indorsed bonds being negotiable instruments, and governed by the same rules as all other commercial paper, the State would become liable, as an accommodation indorser, to any *bona fide* holder who acquired them for value, in the usual course of business, without knowledge or notice, actual or constructive, of the misapplication by the company or its immediate transferee. *Ib.* 566.
 8. *Same; burden of proof as to character of transfer.*—When a subsequent holder of such bonds seeks to enforce the State's liability as indorser, the original misappropriation of them being shown, the law casts on him the burden of proving that he acquired them in good faith, for value, and in the usual course of business. *Ib.* 566.
 9. *Same; what is purchase for value, and in usual course of business.* The sale or exchange of such indorsed bonds for shares of stock in another railroad corporation, or in a joint-stock company or corporation engaged in the business of constructing railroads by contract, is an ordinary commercial transaction; and in determining whether the purchase is for value, the safer doctrine is, when no question of usury is involved, that the amount of the consideration, value being parted with, is only material as bearing on the question of notice. *Ib.* 566.
 10. *Same; proof of notice, or want of notice.*—In such case, the presumption is of a want of notice, since it is not probable, though possible, that notice of the original fraud or illegality would be communicated to a subsequent holder, thereby defeating the transfer; and the burden of proving notice resting on the party who assails the title of the holder, it is not enough to show only that he acquired the bonds under circumstances which would have excited, in the mind of a prudent man, suspicions as to the title of the party from whom he purchased. *Ib.* 566.
 11. *Subrogation of holders of indorsed bonds, to State's statutory lien and priority.*—The holders of such indorsed bonds who have acquired them in good faith, for valuable consideration, and in the usual course of business, are entitled to be subrogated to the statutory lien and priority of the State, on the railroad company becoming insolvent, and making default in the payment of the bonds according to their terms; and this subrogation may be declared in a suit between the holders of such bonds, some of whom are not entitled to share in the protection given to the others, and although the State is not a party and can not be sued. *Ib.* 566.
 12. *Tax-collector's bond; discharge of sureties by judgment discharging principal.*—Where a tax-collector executed an additional bond, as required on the address of the grand jury (Code, §§ 184-90), on which was one new surety besides the sureties on the first bond; and separate actions were brought on each bond, and the same breaches assigned for a default covered by each; held, that a judgment on verdict in an action on the first bond, in favor of the defendants, operated as a discharge of the principal and sureties on the second bond, and was pleadable in bar of the action on that bond. *The State v. Parker, 181.*

CHAMPERTY. See BILLS OF EXCHANGE, AND PROMISSORY NOTES, 2.

CHANCERY.

1. JURISDICTION, AND GENERAL PRINCIPLES.

1. *Administration; when distributees may sue.*—As a general rule, dis-

CHANCERY—*Continued.*

tributees or next of kin can not, in the absence of an administration duly granted, maintain a suit at law or in equity for the mere purposes of administration, nor, in the absence of special circumstances, maintain a suit for the collection of personal assets; and although there are exceptional cases, in which a court of equity will decree distribution directly to the next of kin, without the intervention of an administrator, when it is clearly shown that, if one were appointed, his only duty would be distribution; yet such relief will not be granted at the instance of the next of kin of a deceased adult legatee, upon a mere general allegation that there are no outstanding debts against his estate, when such allegation is made upon information and belief merely, and it is not shown that the information was obtained from persons having knowledge of the facts. *Sulliran v. Lawler*, 68, 72, 74.

2. *Same.*—The distributees of a decedent's estate can not maintain a bill in equity against the personal representative and debtors of the estate jointly, without alleging fraud and collusion between them, or a refusal by the personal representative to sue for and collect the debts. *Ib.* 68.
3. *Same.*—Where the testator devised to his widow a life-estate in all his property, and directed "the balance" of the estate at her death "to be sold, and the proceeds to be equally divided among his children," making his widow executrix; administration on his estate, after the death of the widow, is necessary, before the remaindermen can maintain a suit in their own names. *Ib.* 74.
4. *Decedent's estate; removal of settlement into equity.*—The settlement of a decedent's estate can not be removed into equity by the personal representative, in any case, or at any time, without the assignment of some particular ground of equitable jurisdiction; nor can it be removed at the instance of a distributee, or other party beneficially interested, after the jurisdiction of the Probate Court has attached and commenced to be exercised, unless some question of special equitable cognizance is involved, which the Probate Court is incompetent to determine. *Shackelford v. Bankhead*, 476.
5. *Insolvent estate; removal of settlement into equity.*—When a decedent's estate has been declared insolvent, it requires a very clear and strong case to justify the removal of the settlement into a court of equity. *Ib.* 476.
6. *Same.*—The omission from the inventory of property which ought to have been included, the waste or conversion of assets, and the failure to make a settlement, being matters which are within the jurisdiction of the Probate Court, and as to which its powers are fully adequate to grant relief, furnish no ground for a resort to a court of equity by a creditor. *Ib.* 476.
7. *Discovery; when bill lies.*—When a bill is filed for discovery and relief, seeking to withdraw from a court of law a matter of strict legal cognizance, it must show that the discovery sought is indispensable to the ends of justice—that the facts, as to which a discovery is sought, can not be proved otherwise than by the defendant's answer; and it must aver the existence and materiality of those facts with sufficient certainty, and show that the defendant is capable of making the discovery. *Ib.* 476.
8. *Same; statutory provisions authorizing examination of parties as witnesses, in action at law.*—The several statutory provisions, changing the common-law rules of evidence, and authorizing the examination of parties as witnesses in actions at law, do not take away, or in any manner affect, the established jurisdiction of courts of equity in matters of discovery. *Ib.* 476.
9. *Discovery; when bill lies for.*—A bill for discovery alone must not only aver the facts as to which a discovery is sought, and that

CHANCERY—Continued.

those facts are within the knowledge of the defendant, but must also allege that they can not be proved without his answer; and this allegation, if denied, must be proved. *Sullivan v. Lawler*, 72, 74.

10. *Equitable estoppel against mortgagee*.—Where a mortgagee of lands indorses on the mortgage a receipt for the secured debt before its maturity, and intrusts it to the possession of the mortgagor, pursuant to an agreement between them; and the mortgagor, being in possession of the lands, sells and conveys them to a third person, to whom he also shows the mortgage and indorsement thereon; the mortgage can not be established and enforced against such purchaser, after he has paid the purchase-money without notice of the agreement; and this on the principle, that when one of two innocent persons must suffer from the tortious act of a third, he must suffer the consequences who gave the aggressor the means of doing the wrongful act. *Turner v. Flinn*, 552.
11. *Equitable relief against fraud*.—Fraud vitiates any and every transaction into which it enters, even the most solemn contracts, and the judgments or decrees of courts of the highest jurisdiction; and when a fiduciary relation exists between two persons, which renders it the duty of one to communicate to the other full information of all the facts within his knowledge, the failure to do so is a fraud, against which a court of equity will grant relief. *Humphreys v. Burleson*, 1.
12. *Same; as between distributee and administrator*.—Where an administrator, on filing his accounts for settlement, wrote to his sister, who was a distributee of the estate, and resided in Texas, informing her that her interest in the estate was a specified sum, about one-fifth of its actual value in fact, and inclosing a receipt for that sum, to be signed by her, which would operate as a release, and which was signed and returned to him, and the money paid; *held*, that this was a fraud, against which a court of equity would grant relief by setting aside the settlement, and that the administrator could not be heard to say that the distributee, in relying on his representations, and failing to appear and contest the settlement, was guilty of negligence or other fault. *Ib.* 1.
13. *Equitable relief against settlements in Probate Court*.—A court of equity has original jurisdiction, independent of statutory provisions, to open settlements of administrations had in the Probate Court; but this jurisdiction, though well established, is sparingly exercised, and the party complaining is required to show, by appropriate pleading, not only that injustice has been done, but also that, by reason of accident, surprise, or the act or fraud of his adversary, unmixed with negligence on his own part, he could not have prevented that injustice at the time of the settlement. *Ib.* 1.
14. *Same*.—When the statutory jurisdiction of the Chancery Court is invoked, for the correction of errors of law or fact intervening in settlements had in the Probate Court (Code, §§ 3837-39), the errors complained of must be clearly and certainly pointed out, and it must be made to appear, by the averment of distinct facts, that such errors were not attributable to the fault or neglect of the party complaining. *Ib.* 1.
15. *Same; on ground of errors or mistakes*.—A defendant in a probate decree, rendered on final settlement of his accounts as executor, administrator, or guardian, seeking equitable relief against it on account of alleged errors of law or fact (Code, §§ 3837-39), must show that the errors complained of occurred without fault or negligence on his part. *Lyne's Adm'r v. Wann*, 43.
16. *Same*.—When a party invokes the statutory jurisdiction of the Chancery Court, for the correction of errors of law or fact in a set-

CHANCERY—Continued.

- tlement had in the Probate Court (Code, §§ 3837-39), he must affirmatively show that he was free from fault or neglect; and he can not have relief against the settlement, on account of matters which were cognizable in the Probate Court, on a mere general averment of ignorance, or an averment of ignorance coupled with an admission of knowledge of facts sufficient to put him on inquiry. *Stoudenmire v. DeBardelaben*, 300.
17. *Equitable relief against probate decree.*—When a final settlement of an executor's accounts has been made in the Probate Court, no trusts being involved, and no fraud imputed, a court of equity will not re-open the settlement, unless some special cause for its interposition is shown. *Foxworth v. White*, 224.
 18. *Implied trust; against executor, purchasing at his own sale, or from his vendee.*—A purchase of lands by an executor at his own sale, whether directly in his own name, or indirectly through the agency of a third person, and whether made under an order of court or a power in the will, will be set aside in equity, at the mere election of the parties in interest, if seasonably expressed; but, having made a fair sale to a third person, he may afterwards purchase from his own vendee, and thereby acquire a good title, though the transaction will be jealously scrutinized by a court of equity. *Ib.* 224.
 19. *Same; against attorney, purchasing at sale under execution in favor of client.*—An attorney, having recovered a judgment for his client, and having the control thereof, can not, without the consent of his client, express or implied, become the purchaser of lands at a sale under execution issued thereon; and if he does so purchase, he becomes, like any other agent, a trustee for his client. Such a trust arises by operation of law, and continues until barred by lapse of time, or until terminated by an election to ratify the purchase, thereby giving it validity. *Pearce v. Gamble & Bolling*, 341.
 20. *Same; who may enforce such trust.*—A receiver, appointed by the Chancery Court, succeeding to all the rights and remedies of the client, and authorized to sue, may file a bill to enforce this implied trust against the attorney; and the *onus* is on the attorney to show that the right has been lost by *laches*, or that the purchase has been ratified. *Ib.* 341.
 21. *Resulting trust, implied from payment of purchase-money.*—A resulting trust in lands, in favor of the person who advances the purchase-money, the title being taken in the name of another, is matter of implication only, and is easily overturned; and when the money is advanced by a husband (or father), and title taken in the name of the wife (or child), the presumption arises that an advancement was intended. *Kelly v. Karsner*, 106.
 22. *Trust in fraud of creditors.*—When lands are conveyed by a debtor to his wife or child, with the intent to place the property beyond the reach of his creditors, and to be held in secret trust for his own benefit, neither he nor his heirs can enforce the trust. *Ib.* 106.
 23. *Parol trust in lands.*—Oral evidence, to overturn a writing in any case, must be clear and convincing; and can not be received (Code, § 2199) to engraft an express trust on a conveyance of lands which is absolute in its terms. *Ib.* 106.
 24. *Same.*—A trust in lands, created verbally, can not be established in equity, unless it is plain and unambiguous in its terms, and proved by clear and convincing evidence; and a trust in personal property, created verbally, and dependent entirely upon oral testimony, can only be established by clear and explicit evidence. *Bailey v. Irwin*, 505.
 25. *Injunction; violation of, not cognizable at law.*—The violation of an injunction while in force is a contempt of the court from which

CHANCERY—*Continued.*

- the writ issued, and may be punished by that court while the proceedings are *in fieri*; but a court of law can not take cognizance of it, nor allow it to operate as a forfeiture of legal rights in another suit, when it is not shown that the injunction has been perpetuated by a final decree. *Callen v. McDaniel*, 97.
26. *Equitable lien on common fund, created by agreement.*—Commissioners being appointed by the governor, under authority conferred by a special statute, to locate and procure patents for the State to swamp and overflowed lands donated by act of Congress, their compensation being twenty per cent. of the amount realized by the State on the subsequent sale of the lands, and their expenses to be paid by themselves; an agreement among them, by which one was to advance moneys deemed necessary in the execution of the common business, to be reimbursed out of the fund provided as compensation when collected, creates a charge or lien on the fund, for the amount so advanced, in the nature of an equitable mortgage; which lien or charge is not capable of enforcement at law, and is peculiarly within the jurisdiction of a court of equity. *Powell v. Jones*, 392.
27. *Married women; removal of disabilities; extent of powers conferred by decree.*—Under the provisions of the statute approved February 10th, 1875 (Code, § 2731), chancellors are authorized, either in term time or vacation, on the filing of a proper petition and regular proceedings had under it, "to relieve married women of the disabilities of coverture, as to their statutory and other separate estates, so far as to invest them with the right to buy, sell, hold, convey and mortgage real and personal property, and to sue and be sued as *femmes sole*;" but a decree rendered under this statute removes the disabilities of coverture only to the extent particularly specified in the statute, and does not confer on the petitioner the power to make general contracts. *Cohen v. Wollner, Hirschberg & Co.*, 233.
28. *Same; averments of petition.*—When a petition is filed under this statute, it must allege that the petitioner has a separate estate, statutory or equitable; and the omission of such averment, it being a jurisdictional fact, renders the entire proceeding void. *Ib.* 233.
29. *Marshalling securities as between creditors.*—When one creditor has a lien upon two distinct funds, and another creditor has a lien upon one of them only, a court of equity will, at the instance of the latter, compel the former creditor to exhaust the separate fund before resorting to the fund common to both; but, whether this principle applies to a lien acquired by the service of an attachment or garnishment at law, is not decided. *Henderson v. Ala. Gold Life Insurance Co.*, 32.
30. *Same.*—The holder of a policy of life-insurance having transferred it as collateral security to one of his creditors, and afterwards assigned his interest in the residue to a second creditor, other creditors can not maintain a bill in equity, the money having been paid into court by the garnishee, to compel the second assignee to exhaust other securities held by him before resorting to the surplus. *Ib.* 30.
31. *Private nuisance; jurisdiction of equity to abate; verdict and judgment at law.*—The jurisdiction of a court of equity to enjoin a private nuisance, at the suit of a person thereby aggrieved, compelling its abatement, is well established; and when the legal title of the party complaining is clear and undoubted, it is not necessary that his right should be first established by a verdict and judgment at law. *Nininger v. Norwood*, 277.

CHANCERY—Continued.

32. *Same; adequacy of legal remedies.*—When the injury complained of is permanent, continuous, or constantly recurring, though there may be a remedy at law, it is obviously inadequate; and the interference of a court of equity is necessary, to prevent irreparable injury and a multiplicity of suits. *Ib.* 277.
33. *Same; limitation of action or suit.*—By analogy to the statute of limitations at law barring an action for the recovery of lands (Code, § 2900), ten years is a bar in equity to a suit which seeks to enjoin and abate an embankment on land as a private nuisance to the owner of the adjacent upper lands. *Ib.* 277.
34. *Injunction against obstruction of navigable river.*—The obstruction of the navigation of a public, navigable river, is a public nuisance, which a court of equity will enjoin and restrain at the instance of a citizen who is suffering, or will suffer irreparable injury. *Walker v. Allen*, 450.
35. *Foreclosure of mortgage.*—A mortgagee may file a bill in equity to foreclose the mortgage, although he may also have an adequate remedy at law for the recovery of the debt. *Whitehead v. Lane & Bodley Company*, 39.
36. *Equitable mortgage created by recital in note.*—A declaration and recital in a promissory note, executed by a mortgagor to the mortgagee, that it "shall be covered by the mortgage," or "shall be subject to the mortgage," shows an intention to make the mortgage a valid security for the debt, and creates an equitable lien or mortgage on the premises for its payment; but, if the note is signed by the husband only, the equitable lien of the note does not attach to the homestead included in the lands conveyed. *Butts v. Broughton*, 294.
37. *When absolute deed will be declared mortgage.*—In a court of equity, a conveyance of lands, absolute and unconditional on its face, will be declared and established as a mortgage, on clear and certain proof that the parties intended it should stand simply as a security for a debt; and this fact may be proved by parol evidence, or may be shown by a separate writing. *Turner v. Wilkinson*, 361.
38. *Whether transaction is mortgage, or conditional sale.*—When the conveyance is absolute on its face, and the controversy is whether it was intended as a mortgage or an unconditional sale, the party asserting that it was intended as a mortgage must show, by clear and convincing evidence, that it was so understood and intended by the parties at the time of the original transaction; but, when it is admitted that the transaction was not, as the conveyance on its face imports, an absolute and unconditional sale, and it is doubtful whether it was intended as a mortgage or as a conditional sale, the court is inclined to consider and treat it as a mortgage. *Ib.* 361.
39. *Same.*—The court states the tests of controlling importance in such cases, as laid down in former decisions, and declares the transaction in this case, when subjected to these tests, to have been intended as a mortgage, and not as a conditional sale. *Ib.* 361.
40. *Reformation of written instruments in equity.*—When, through mistake or fraud, a written instrument fails to express a material term of the real contract which the parties mutually intended to make, a court of equity will reform it, on clear and satisfactory proof, so as to make it express the true contract; and this relief will be granted, not only between the immediate parties to the contract, but also against creditors and purchasers chargeable with notice of the mistake; but not against innocent third persons who have acquired vested rights, and who can not be placed *in statu quo*. *Berry, Demorville & Co. v. Sowell*, 14.

CHANCERY—*Continued.*

41. *Same.*—On the facts of this case,—a father having conveyed by deed a house and lot to his married daughter, reciting only love and affection as its consideration, and not using any words which would exclude the marital rights of her husband; and an attachment against the father being afterwards levied on the property—the deed was reformed, against the husband, the father, and the attaching creditor, on averment and proof that the husband bought the property, paid a part of the price with moneys belonging to his wife, and conveyed it to her father, under a verbal agreement between the three that it should be conveyed to the wife as an equitable separate estate; and that it was not so conveyed through mistake on the part of the draughtsman. *Ib.* 14.
42. *Same; voluntary conveyance; parol evidence as to consideration.*—A voluntary conveyance is void as to the existing creditors of the grantor, and parol evidence is not admissible, at law, to contradict its recitals as to the consideration. Hence, the grantee, claiming that the deed was founded in fact on valuable consideration, would be without legal remedy against an attaching creditor of the grantor, and the levy of the attachment would be no obstacle to a reformation of the deed in equity. *Ib.* 14.
43. *Same; who is bona fide purchaser; right of creditor to pursue moneys of debtor.*—The attaching creditor in such case, seeking to recover an antecedent debt due from the grantor, can not claim protection as a *bona fide* purchaser, against the equity of the grantee to have the deed reformed; nor can he claim that the deed is partly voluntary (and to that extent fraudulent and void as to him), because the grantor, his debtor, paid a balance of purchase-money due to the original vendor of the land, when it appears that he was bound on the note as surety for the purchaser, the husband of the grantee; nor can he assert any rights against the land, by subrogation or otherwise, on account of the moneys thus paid by his debtor. *Ib.* 14.
44. *Correction of mistake by voluntary act of parties; when demand and refusal is necessary.*—A court of equity will not interpose to correct an innocent mistake, capable of full correction by the voluntary act of the parties, unless a demand and refusal to correct it is alleged and proved, or a reasonable excuse is shown for the failure to ask it; but, when the bill shows that the vendor or grantor is dead, and that his only heir is an infant, this excuses the failure to ask such correction, and justifies a resort to a court of equity. *Harold Brothers & Scott v. Weaver*, 373.
45. *Statute of limitations, and lapse of time, as bar to relief against mistake.*—The statute of limitations, or lapse of time, will bar equitable relief against mistake, as well as against fraud; the period of the bar being computed from the discovery of the mistake, or the time at which, by the exercise of reasonable diligence, it might have been discovered. *Ib.* 373.
46. *Same.*—In this case, the complainant having been in the peaceable possession of the land intended to be conveyed, from the execution of the conveyance to him, in which the lands were incorrectly described, to the filing of his bill for the correction of the mistake, a period of more than twenty years, and having only recently learned the mistake, from the assertion of a hostile title and claim by a sub-purchaser from the personal representative of his deceased vendor,—the lapse of time was held no bar to the reformation of the deed. *Ib.* 373.
47. *Partition of lands in equity; when decreed.*—To sustain a bill in equity for the partition of lands, the complainant must allege, and prove if denied, an undivided interest in the lands, jointly or in

CHANCERY—Continued.

- common with the defendant; and it is not sufficient to show title in severalty to a distinct portion. *Russell v. Beasley*, 190.
49. *Receiver; when appointed before answer.*—By the modern English practice, and by the practice in this country, a receiver may be appointed before answer filed, when a pressing necessity is shown, since delay might defeat the object sought by the application. *Weis v. Goetter, Weil & Co.*, 259; *Micou v. Moses Brothers*, 439.
50. *Same; at whose instance appointed.*—As a general rule, a receiver will not be appointed at the instance of a party who does not show some title, claim, lien or interest, in, to, or upon the property, or specific thing in litigation; but a creditor by simple contract only, being now authorized by statute to file a bill to reach and subject property fraudulently conveyed by his debtor (Code, § 3886), acquires by his bill, and the service of process under it, such an interest and lien in and upon the property as entitles him to ask the appointment of a receiver for its custody and preservation. *Ib.* 259.
51. *Same.*—A judgment creditor of an insolvent debtor, having an execution returned "No property found," and seeking by his bill to reach and subject the debtor's alleged interest in certain crops raised on a plantation carried on in the name of another person, shows such a lien on or title to the crops as authorizes him to ask the appointment of a receiver; and the proof showing very clearly that the property is being rapidly disposed of by irresponsible parties, under the management of the debtor, so that its loss is imminent, and the charge of fraud being strongly supported by all the circumstances of the case, a *prima facie* case for the appointment of a receiver is made out. *Ib.* 439.
52. *Same; affidavits, and how rebutted.*—The practice is well established, that *ex-parte* affidavits may be received in support of an application for the appointment of a receiver, and counter affidavits in opposition to it; but the court "is unwilling to sanction the practice, which seems to have been followed in this case, of permitting a voluminous deposition, containing irrelevant matter, to be introduced for the purpose of contradicting the affidavit of the deponent." If it was necessary to rebut or impeach the statements of the affidavit, it should have been done by an extract of the pertinent matter from the deposition, embodied in an explanatory affidavit, or attached thereto as an exhibit. *Ib.* 439.
53. *Same; want of parties, or of notice.*—That some of the parties in interest are not before the court, and that others have had no notice of the application, is no valid objection to the appointment of a receiver; since the receiver holds for the parties in interest, and his appointment does not affect any existing rights of persons before the court, who may at any time propound their interest. *Ib.* 439.
54. *When receiver may sue.*—A receiver appointed by the court, succeeding to all the rights of the client, and authorized to sue, may file a bill against an attorney, to enforce the implied trust arising from his purchase of lands at a sale under execution in favor of the client. *Pearce v. Gamble & Bolling*, 341.
55. *Res adjudicata, at law and in equity.*—In the application of the principle of *res adjudicata*, there is no difference between courts of law and courts of equity; when an issue of fact, or of law, has been adjudicated on the merits in either tribunal, it can not be again litigated in the other. *Strang v. Moog*, 460.
56. *Rescission of contract, at instance of purchaser; lien for purchase-money paid.*—In rescinding a contract for the sale of lands, at the instance of the purchaser, the court may decree a lien on the land in his favor, for the purchase-money paid; but this lien is confined

CHANCERY—*Continued.*

- to such lands, or portions thereof, as the vendor had the legal right to convey. *McWilliams v. Jenkins*, 480.
57. *Same; conflicting claims of purchaser, and heirs of vendor for rent.* In such case, the land being the homestead exemption of the vendor and his family, which is not liable for his contract debts, the lien in favor of the purchaser is properly declared to be subordinate to the claim of the vendor's heirs for the rents while the purchaser was in possession under the contract. (BRICKELL, C. J., dissenting.) *Ib.* 480.
58. *Specific performance of contract.*—A court of equity will not specifically execute every contract into which parties may lawfully enter; nor does it necessarily follow that a specific performance will be decreed, because a rescission has been refused at the instance of the defendant, in a former suit between the parties, and that decree is binding as *res adjudicata*. It is always a matter within the judicial discretion of the court, whether to grant or refuse a specific performance; and it may and should be refused, unless the contract is not only legally binding, but also fair, just, and reasonable in all its parts; in other words, there must be "a valuable consideration, particularity, certainty, mutuality, and a necessity for performance." A specific performance is refused in this case, because the evidence is held insufficient to show that the contract was supported by an adequate consideration, and was fair and just in all its parts. *Moon's Adm'r v. Crowder*, 70.
59. *Bill for specific performance; when prematurely filed.*—A bill for specific performance is prematurely filed by the purchaser, when the purchase-money has not been paid, and, by the terms of the contract, is not due until a future day; as where the contract stipulates that the vendor "is to give him three years to pay, without interest," and is not bound to convey until the purchase-money is paid, and the bill is filed before the expiration of the three years. *Thompson v. Gordon*, 555.
60. *Specific performance of contract; when decreed.*—A court of equity will not decree the specific execution of a contract, unless it is fair, just, reasonable, and equal in all its parts; it must also be founded on an adequate consideration, and be mutual in its operation and effect; and its specific execution must effectuate the real intention of the parties, and must be free from any hardship or oppression. *Irwin v. Bailey*, 467.
61. *Same.*—There is no other class of cases, within the jurisdiction of a court of equity, to which the maxim is more rigidly applied, that he who seeks equity must do equity; and hence, where a specific performance could not be decreed against the party asking it, it will not be decreed in his favor, but the parties will be left to their legal remedies. *Ib.* 467.
62. *Specific performance refused, for want of mutuality; special relief granted by subrogation to discharged mortgage.*—Where a married woman advanced to her father, either as a loan, or in trust to be invested for her benefit in a tract of land, moneys belonging to her as an equitable separate estate, which he used in part payment of the purchase-money for the land, but took the title in his own name; and dissatisfaction being expressed by the daughter and her husband, because the title was so taken, and because there was no written evidence of her interest in the land, or that her money was used in paying for it; thereupon, after the death of the wife and daughter, the father agreed in writing with the surviving husband, "in consideration," as therein recited, "of having given my late daughter certain money, part of which she returned to me at or shortly after I purchased" the lands, to convey a specified part of the lands to the husband, with half of his stock, farming

CHANCERY—Continued.

implements, &c., on condition as follows: "he to pay off the mortgage for \$3,000 that now stands against the property, and, if judgment is obtained against me in a suit now pending in favor of R. & Co., to pay one-half the amount thereof; he to lift the mortgage within the present year, and I to make him a deed to the property when he is prepared to lift the mortgage;" *held*, on bill filed by the husband after paying the mortgage, that he was not entitled to a specific performance of the contract, since he could not discharge the defendant from liability for the moneys so invested in the lands, and therefore the contract could not be enforced against him; *held*, also, that he was entitled to be subrogated to the rights of the mortgagee, to the extent of the moneys paid by him in satisfaction of the mortgage. *Ib.* 467.

63. *Averments of bill by purchaser, to compel conveyance of legal title.*—When a purchaser, or sub-purchaser, of lands sold by an administrator under an order or decree of the Probate Court, files a bill in equity in the nature of a bill for specific performance, seeking to obtain a conveyance of the legal title from the heirs, and to enjoin an action at law by a succeeding administrator, he must aver and prove the facts which give the court jurisdiction to order the sale; and the averment of mere legal conclusions—as, "appropriate allegations," "proper parties," "legal grounds," etc.—is not sufficient.—*Gilchrist v. Shackelford*, 7.
64. *Proof of proceedings authorizing sale.*—When the averments of the bill are denied, the *onus* of proving the facts necessary to support the order and sale is on the complainant; and these facts are properly proved by a transcript from the record of the Probate Court, if in existence; and if the record has been lost or destroyed, it must be proved as other disputed facts are proved. *Ib.* 7.
65. *Application of purchase-money to debts of estate; correspondence of allegations and proof.*—If the complainant fails to prove the facts necessary to sustain the validity of the sale, he can not have relief because the proof shows that the purchase-money was applied in paying the debts of the estate, when the fact is not averred in the bill. *Ib.* 7.
66. *Protection extended to bona fide purchaser without notice.*—A purchaser in good faith, and for valuable consideration, of lands chargeable with an outstanding equity, of which he had no notice until after he had paid the purchase-money, will be protected against it in a court of equity. *Turner v. Wilkinson*, 361.
67. *Subrogation of sureties on note for purchase-money, to vendor's lien on land, as against sub-purchaser who has made payment.*—If the sureties on a note given for the purchase-money of land, having paid the balance due on the note, can claim to be subrogated to the vendor's equitable lien on the land, they can not assert that right against a sub-purchaser of a portion of the tract, when the purchase-money paid by the latter has been applied in partial payment of the note on which the sureties were bound. *Sawyers v. Baker*, 49.
68. *Subrogation of holders of indorsed bonds, to State's statutory lien and priority.*—The holders of State-indorsed bonds who have acquired them in good faith, for valuable consideration, and in the usual course of business, are entitled to be subrogated to the statutory lien and priority of the State, on the railroad company becoming insolvent, and making default in the payment of the bonds according to their terms; and this subrogation may be declared in a suit between the holders of such bonds, some of whom are not entitled to share in the protection given to the others, and although the State is not a party and can not be sued. *Gilman, Sons & Co. v. N. O. & S. Railroad Co.*, 566.

CHANCERY—Continued.

II. PLEADING AND PRACTICE.

69. *Parties to bill; corporation and its officers.*—When a bill in equity is filed by a creditor against a corporation, its directors and officers, against whom no relief is prayed, and against whom no fraud, conspiracy, or breach of trust is charged, can not be joined as defendants for the sole purpose of discovery. *Norwood v. M. & C. Railroad Co.*, 563.
70. *Misjoinder of defendants; who may take advantage of; error without injury.*—When persons who have no interest in the subject-matter of the suit, and against whom no relief is prayed, are improperly joined as defendants to a bill, the misjoinder is a defense personal to them, and the other defendants can not take advantage of it; but, if the other defendants demur on account of such misjoinder, a decree sustaining the demurrer, but without dismissing the bill, is error without injury to the complainant. *Ib.* 563.
71. *Parties to bill for foreclosure.*—The personal representative of the deceased mortgagor is a necessary and indispensable party to a bill which seeks to foreclose a mortgage on lands, unless it is shown that the assets in his hands are discharged from all liability for the debt. *Boyle v. Williams*, 351.
72. *Non-joinder of parties; how taken advantage of.*—While the general rule is, that an objection for the want of parties must be taken by demurrer or plea, or be insisted on in the answer; yet the want of an indispensable party—one in whose absence a decree can not properly be rendered—is available on the hearing, or on error. *Ib.* 351.
73. *Parties to creditor's bill.*—When a creditor at large files a bill to reach and subject lands alleged to have been fraudulently conveyed by his debtor (Code, § 3886), the debtor himself, if living, is a necessary party defendant to the bill; and if he obtains a discharge in bankruptcy pending the suit, his assignee is a necessary party defendant. *Harris v. Moore*, 507.
74. *Parties to bill to enforce trust.*—When lands are held in trust, express or implied, and the *cestui que trust* dies, the right to enforce the trust descends to all of his heirs equally, and all are necessary parties to a bill filed for that purpose. *Kelly v. Karsner*, 106.
75. *Statutory provisions as to parties, in suits by married women.*—The statute which provides that a married woman "must sue or be sued alone, when the suit relates to her separate estate" (Code, 2892), applies only to actions at law, and has no reference to suits in equity. *Sawyers v. Baker*, 49.
76. *Rules of practice as to parties, in suits by married women.*—The 15th Rule of Chancery Practice, adopted in January, 1877, providing that "all bills and petitions by married women, in reference to their separate estates, shall be exhibited in their own names, if over twenty-one years of age, or relieved of the disabilities of coverture" (Code, p. 163), was intended to carry out the legislative policy indicated by the said act approved March 4th, 1876, since inoperative because omitted from the Code of 1876; and while said rule applies equally to all separate estates, whether statutory or equitable, it extends only to cases in which, prior to its adoption, it was necessary that a married woman should sue by her next friend, and does not apply to cases in which it was necessary or proper that she and her husband should join as co-complainants. *Ib.* 49.
77. *Joinder of husband and wife as plaintiffs.*—As decided in this case on a former appeal (66 Ala. 292), the wife is a proper and necessary party to a bill filed by the husband, seeking the specific performance of a contract for the sale of a tract of land, when it ap-

CHANCERY—Continued.

- peared that the purchase-money was paid with funds belonging to the wife's statutory estate, though the title-bond was taken in the name of the husband; and if the evidence establishes the case made by the bill, the title should be vested in the wife by the decree of the court for a specific performance. *Ib.* 49.
78. *Bill by husband and wife, and dismissal thereof by husband.*—A bill filed in the names of husband and wife jointly, to enforce payment of an annuity charged on lands, and made payable to the husband for the mutual benefit of himself and wife during their joint lives, is the bill of the husband alone; and a dismissal of the bill by him, on compromise with the defendant, does not prejudice the rights of the wife, nor bar her from maintaining another bill to enforce payment of her part of the annuity. *Sloan v. Frothingham*, 539.
79. *Filing bill in wrong district; how objected to.*—When a bill shows on its face that it is not filed in the proper district, it is subject to demurrer, or may be dismissed on motion; and if the fact does not appear on the face of the bill, a plea in the nature of a plea in abatement is the proper mode of presenting the objection. *Harvell v. Lehman, Durr & Co.*, 344.
80. *Where bill may be filed; who is material defendant.*—A material defendant, as the term is used in the statute specifying the several districts in which a bill may be filed (Code, § 3760), means a necessary or indispensable party, as distinguished from one who is merely a proper party. *Ib.* 344.
81. *Same; parties to bill for foreclosure.*—When a junior mortgagee files a bill, asking a foreclosure of his mortgage, an account of both of the mortgage debts, and a sale of the property free from the incumbrance of both mortgages, the senior mortgagee is a necessary and indispensable party; and the bill may be filed in the district in which he resides. *Ib.* 344.
82. *Same; where mortgage has been assigned.*—If the senior mortgage has been assigned, absolutely and unconditionally, leaving in the mortgagee no interest in it or the debt secured by it, the assignee would be a necessary party to a bill for foreclosure filed by a junior mortgagee, and the senior mortgagee would be only a proper party; but, if the assignment was conditional, and the condition had not been performed when the bill was filed, the assignor would be a necessary party, and the bill might be filed in the district of his residence; and being so filed, the subsequent performance of the condition, whereby the assignment became absolute, would not divest the jurisdiction of the court, nor be good ground for dismissing the bill. *Ib.* 344.
83. *When distributees may sue, without administration.*—The general rule is, that distributees, or next of kin, can not maintain a suit for the mere purpose of distribution, until letters of administration have been granted on the estate of the decedent; and this rule must prevail, unless facts are affirmatively shown which bring the particular case within the recognized exception dispensing with an administration when it would be a useless ceremony. *Sullivan v. Lawler*, 68, 72, 74.
84. *When distributees or administrator may or must sue.*—When there is an administrator of the estate of a deceased legatee, he is the proper person to sue for the legacy; consequently, the next of kin, or distributees of his estate, can not join in a bill with the surviving legatee, making the administrator a defendant. *Ib.* 68.
85. *Bill to redeem; who may file.*—A bill to redeem under a mortgage may be filed by any one who owns the mortgagor's equity of redemption, or any subsisting interest therein, by privity of title with him, whether by purchase, inheritance, or otherwise; and under this principle, the widow of the mortgagor, who joined with

CHANCERY—*Continued.*

- her husband in the execution of the mortgage, and who claims a homestead in the premises, may be joined with the heirs in a bill to redeem. *Butts v. Broughton*, 294.
86. *Filing bill in double aspect.*—A creditors' bill can not be filed in a double aspect, asking to set aside a conveyance as fraudulent, or, in the alternative, to have it declared and enforced as a general assignment under the statute (Code, § 2126), enuring to the equal benefit of all the creditors; and the principle applies equally to a general creditors' bill, and to a bill filed by one or more creditors for their own benefit. (Adhering to *Lehman v. Meyer*, 67 Ala. 396, which overruled *Crawford v. Kirksey*, 50 Ala. 590.) *Mong v. Talcott*, 210.
 87. *Allegations of bill.*—An allegation in a bill, seeking to enjoin the obstruction of a stream, that the stream "is a navigable river," is merely the statement of a legal conclusion. *Walker v. Allen*, 456.
 88. *Averments of bill by purchaser, to compel conveyance of legal title.* When a purchaser, or sub-purchaser, of lands sold by an administrator under an order or decree of the Probate Court, files a bill in equity in the nature of a bill for specific performance, seeking to obtain a conveyance of the legal title from the heirs, and to enjoin an action at law by a succeeding administrator, he must aver and prove the facts which give the court jurisdiction to order the sale; and the averment of mere legal conclusions—as, "appropriate allegations," "proper parties," "legal grounds," etc.—is not sufficient. *Gilchrist v. Shackelford*, 7.
 89. *Argumentative allegations.*—Argumentative allegations in a bill are objectionable. *Lake v. Security Loan Association*, 207.
 90. *Allegations of misrepresentations not showing fraud.*—In a bill filed by a stockholder in an incorporated building and loan association, asking an account and redemption under a mortgage which he had executed to the association, averments in these words, "Your orator's purpose in obtaining said shares of stock in the outset was to enable him to borrow the money, and not as an investment in the stock, and this purpose was well known to the officers of said company; and orator was moved to borrow the money, and pay this \$75 per month, by the statements and calculations made by said officers, and given to him, that this stock would be worth \$200 per share after the one-hundredth installment was paid in, and he became a stockholder by the purchase of stock for the above purpose, and under the foregoing representations,"—show only the expression of an opinion or judgment on a matter which was equally open to both parties, and do not amount to a charge of fraud or willful misrepresentation. *Ib.* 207.
 91. *Bill in equity; when admissible as evidence in another suit.*—A bill in equity, not sworn to, is regarded as the mere suggestion of counsel, and is not admissible as evidence against the complainant in another suit; but, when duly sworn to by him, it is an admission of the facts therein stated, and admissible as evidence against him in another suit. *Callan v. McDaniel*, 96.
 92. *Amendment of bill; takes effect when.*—An amendment which introduces no new subject, but only makes more specific the charges of the original bill, takes effect as of the day on which the original bill was filed. *Lipscomb v. McClellan*, 151.
 93. *Multifariousness; election.*—A bill which seeks a redemption and account under a mortgage executed by the complainant's deceased brother to the defendants, the complainant claiming as a junior mortgagee; and also a redemption and account under a mortgage on another tract of land, executed by the complainant himself to the defendants, and the specific execution of an agreement by which, as alleged, the defendants redeemed the latter tract of

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land from a purchaser at execution sale, for the benefit of the complainant, and were to allow him to redeem from them on repayment of the amount advanced, with interest, and the balance due on the mortgage debt, is multifarious; but, a demurrer being sustained to the bill on that ground, the court "approves the practice of putting the complainant to his election." *Jenkins v. Lovelace*, 303.

94. *Demurrer; what grounds available on error.*—On appeal from a decree sustaining a demurrer to a bill for want of equity, this court will consider only the causes of demurrer specifically assigned, and will not regard other defects which are amendable; at least, when the bill is not fatally wanting in equity. *Humphreys v. Burleson*, 1.
95. *Correspondence of pleadings and evidence.*—Evidence alone, without corresponding allegations in the bill, does not entitle the complainant to any relief. *Jenkins v. Lovelace*, 303; *Gilchrist v. Shackelford*, 7.
96. *Weight of answer as evidence.*—An answer, not under oath, is not evidence for the respondent for any purpose; and when verified by affidavit (Code, § 3786), it is only evidence so far as responsive to the allegations of the bill. *Buchanan v. Buchanan*, 55.
97. *When answer is responsive, or not.*—When the bill, filed by a creditor, attacks the validity of a conveyance to the debtor's son, alleging that the purchase-money was paid by the debtor with his own funds; and the answer, admitting this fact, alleges that it was so paid in consideration of a debt due from the debtor to his son; this is not responsive, but is matter in avoidance, and must be proved. *Ib.* 55.
98. *Answer; whole admissible, when part has been read.*—When parts of an answer to a bill in equity have been read in another suit as evidence against the respondent, he has the right to read the whole of it as evidence. *Callan v. McDaniel*, 96.
99. *Answer and cross-bill, without and under statutory provisions.*—In the absence of statutory provisions, an answer and a cross-bill are separate and distinct modes of defense, and can not be blended in one pleading; and the statute which authorizes a defendant to embrace in his answer matters which might be made the subject of a cross-bill, and to have it heard and considered as a cross-bill (Code, §§ 3801-04), applies only to those cases in which relief is sought against the complainant in the original bill, and does not authorize the answer of one defendant to be converted into a cross-bill as against another. *Gilman, Sons & Co. v. N. O. & S. Railroad Co.*, 566.
100. *Cross-bill between co-defendants.*—Independently of statutory provisions, a cross-bill may be maintained by one or more of several defendants, asking relief against the original complainant and the other defendants; and when such a cross-bill has been filed by one defendant, bringing the entire subject of litigation before the court, a second cross-bill by another defendant is unnecessary, and is properly dismissed. *Ib.* 566.
101. *Cross-bill.*—A cross-bill can not be maintained when it is inconsistent with the answer, nor can it be supported on facts not averred in the answer; and this principle applies where there is an agreement of record that the defendants shall each be entitled, under his answer, to the same relief as under a cross-bill regularly filed. *Hatchett v. Blanton*, 423.
102. *Pleading statute of frauds.*—The statute of frauds, as a defense in equity to a bill which seeks the specific performance of a contract relating to lands, must be pleaded, unless the bill shows on its

CHANCERY—Continued.

- face that the contract is obnoxious to the provisions of the statute. *Bailey v. Irwin*, 505.
103. *Reference to register before decree of sale.*—When the defendants to a bill for foreclosure are all adults, and do not suggest or claim, in the court below, that the mortgaged premises are susceptible of division, and that a sale of a part only will be sufficient to satisfy the mortgage debt, the court may decree a sale without a reference as to these matters; but, if some of the defendants are infants, or are not *sui juris*, it is irregular and erroneous to render a decree of sale, without a prior reference to the register to ascertain and report whether the premises are susceptible of division, whether a sale of part only would not be sufficient, whether the interest of the infants requires a sale in parcels, and what parcel should be first sold. *Boyle v. Williams*, 351.
 104. *Testimony taken before cause is at issue.*—Testimony taken in a chancery cause before the cause is at issue as to a material defendant, is not admissible as evidence against him for any purpose. *Harris v. Moore*, 507.
 105. *Objections to evidence; when and how made*—When interrogatories propounded to a party, as a witness in his own behalf, call for illegal evidence, objection should be taken before filing cross-interrogatories; but this rule does not prevail, when the illegality of the evidence is unknown, or is only disclosed by the answers. *Binford's Adm'r v. Dement*, 491.
 106. *Same.*—Objecting to interrogatories which call for illegal evidence, without more, is not sufficient to bring before the chancellor the question of the admissibility of the evidence: there must be, also, written exceptions signed by counsel, specifying the portions of the testimony sought to be suppressed. *Ib.* 491.
 107. *Same.*—Motions to suppress testimony, founded on exceptions duly filed, are properly heard before entering on the trial; or, by consent, they may be heard and determined in connection with the main cause; but, when the parties proceed to a hearing by agreement, stipulating that the chancellor may disallow all illegal evidence, this "rather loose practice has a tendency to cast on the chancellor so much unnecessary labor, that he may very justly refuse to act on such agreement." *Ib.* 491.
 108. *Same.*—Objections to evidence can not be raised for the first time in this court, but are waived when not properly taken before the chancellor. *Ib.* 491.
 109. *Deposition; indorsement by commissioner, showing title of cause.* The 64th Rule of Chancery Practice, requiring the commissioner to indorse on a deposition the title of the cause in which it is taken (Code, p. 170), is directory merely, and the failure to make such indorsement does not render the deposition inadmissible as evidence. *Quarles v. Campbell*, 64.
 110. *Dismissal of bill on demurrer, in vacation.*—When a bill is dismissed on demurrer, in vacation, the complainant should be allowed an opportunity to amend it; and the failure to allow him such opportunity will work a reversal of the decree on error. *Stoudenmire v. DeBardelaben*, 300.
 111. *Same.*—The dismissal of a bill in vacation, on account of defects which are amendable, without allowing the complainant an opportunity to amend, is an error which will work a reversal; but, when such dismissal is in term time, the record must show that he asked leave to amend. *Shackelford v. Bankhead*, 476.
 112. *Dismissal of bill by plaintiff.*—By the 31st Rule of Chancery Practice (Code, p. 166), which follows the English rule, if the complainant cause his bill to be dismissed on his own application, after the cause is set down for hearing, "such dismissal is, unless

CHANCERY—Continued.

- the court otherwise orders, equivalent to a dismissal on the merits, and may be pleaded in bar to another suit for the same matter." *Strang v. Moog*, 460.
113. *Conclusiveness of decree dismissing bill*.—When a bill in equity is dismissed for want of jurisdiction, or because the complainant has a plain and adequate remedy at law, or because of any mere defect in the pleadings, or, generally, on any other ground not involving the merits, such dismissal is usually stated to be "without prejudice," and is not held to be a final and conclusive adjudication of the matters in litigation; but, when a bill is dismissed on the merits, the decree is final and conclusive, like a judgment at law, not only as to all facts or issues actually decided, but as to all points necessarily involved in the matter adjudicated. *Ib.* 460.
114. *Same*.—When a bill assails the validity of a mortgage on the ground that the consideration was an illegal agreement to suppress a criminal prosecution, a decree dismissing it on the merits, because the proof failed to sustain the allegations, is conclusive as to that issue; and it can not be again litigated in an action at law founded on the mortgage. *Ib.* 460.
115. *Same*.—When the complainant voluntarily dismisses his bill, the decree dismissing it "is very like a voluntary nonsuit at law, which does not bar a second suit;" but, where the decree recites that the cause "again came on to be heard, on the papers formerly read, and the answer of the defendant, with the exhibits filed with said answer, and with general replication to said answer, and upon the report of the master commissioner, made in pursuance of the decretal order of the last term, and was argued by counsel;" and then proceeds, "on consideration whereof, and on motion of the plaintiff, the court doth adjudge, order and decree, that the bill of plaintiff be dismissed, and that he pay to the defendant his costs in this behalf expended, but the defendant is not to be barred or precluded by this decree from asserting or recovering, in any proper suit, any balance which may be found due him by the plaintiff, as set out and asserted in the answer of said defendant, growing out of the account asked for in said bill;" this, *it seems*, is not a voluntary dismissal by plaintiff, but rather only shows that he moved for a decree in the cause. *Moon's Adm'r v. Crowder*, 79.
116. *Costs*.—In the imposition of costs, the chancellor exercises a legal discretion, governed by precedents and by general rules applicable to the varying circumstances of particular cases; and this discretion is fully exercised and exhausted, when a decree for the payment of costs is embodied in a final decree settling the equities of the case, declaring and defining the rights of the parties. *Ex parte Robinson*, 390.
117. *Same; final decree as to, not amendable or revisable at subsequent term*. While clerical errors may be corrected at a subsequent term, the sentence and judgment of the court—that which has been deliberately ordered and adjudged in the final decree—can not be changed or modified at a subsequent term; and this is as true of that part of the decree which adjudges the costs, as of any other part. *Ib.* 389.
118. *Revision of chancellor's decision on facts*.—This court will not disturb the chancellor's decision on a disputed question of fact, when the record does not clearly show that he erred. *Butts v. Broughton*, 294.
119. *Same*.—This general rule applies in this particular case with greater force than usual, since the chancellor had before him the original writing, the genuineness of which was in issue, and other writings admitted to be genuine, none of which are before this court. *Moon's Adm'r v. Crowder*, 79.

CHANCERY—*Continued.*

120. *Revision of chancellor's rulings on exceptions to register's report.*—On appeal from the chancellor's decree overruling exceptions to the register's report upon matters of account, dependent upon the register's conclusions from the evidence adduced before him, this court will indulge all reasonable presumptions in favor of the register's rulings, and will not disturb them unless they are clearly shown to be wrong. *Winter v. Banks*, 409.

CHARGE OF COURT TO JURY.

1. *Charges requested ignoring material facts, or requiring explanation.* Charges requested, which ignore or obscure material evidence, or which require additional instructions to prevent them from misleading the jury, may be refused. *Callan v. McDaniel*, 96.
2. *Charges given, having tendency to mislead.*—A charge given, having a tendency to mislead the jury, is not an error which will work a reversal of the judgment, since the appellant, if apprehending injury from it, might have asked explanatory instructions. *Ib.* 96.
3. *Charge referring legal question to jury.*—It is the duty of the court to determine whether the summons is an original or an *alias*, and a charge which refers the decision of that question to the jury is erroneous. *Ala. Great So. Railroad Co. v. Hawk*, 112.
4. *Abstract charge as to complicity of third person with crime.*—When there is no evidence whatever tending to connect any other person than the accused with the death of the child alleged to have been murdered, or with the concealment of its body where it was found, charges requested, based on the supposed complicity of some other person with the crime, are abstract, and are properly refused on that account. *Hubbard v. The State*, 164.
5. *Charge as to sufficiency of proof when evidence is conflicting.*—A charge requested, which instructs the jury that, when one witness swears to the existence of a fact, and another witness, of equal credibility, swears to its non-existence, the fact is not proved, unless there is other satisfactory proof of it, which, standing alone, would be sufficient to establish the probability of its truth, if not erroneous, is certainly misleading, and therefore properly refused. *Dorgan v. The State*, 173.
6. *General exception to entire charge.*—A general exception to an entire charge, containing several separate and separable clauses, some of which are correct, can not be sustained; the particular clauses, supposed to contain error, should be specifically excepted to. *Farley v. The State*, 170.
7. *General exception to charges given or refused.*—A general exception to several charges given can not be sustained, unless each of them is erroneous; and in like manner, a general exception to the refusal of several charges asked can not be sustained, unless each one of them embodies a correct legal proposition applicable to the evidence. *Storall v. Fowler*, 77.
8. *Construction of writings; questions for court and jury.*—It is the province of the court to construe written instruments, and to declare their legal effect; although, when the legal operation and effect of the instrument depends, not only on the meaning and construction of the words used, but also upon collateral facts and extrinsic evidence, the inference of fact to be drawn from the evidence should be submitted to the jury; yet, if the evidence is addressed to the court, without objection, and passed on, the court may draw all such inferences as the jury could properly have drawn. *Boykin v. Bank of Mobile*, 262.
9. *Construction and operation of deed; questions for court and jury.* The construction of a deed is always a question for the court; but,

CHARGE OF COURT TO JURY—*Continued.*

when its construction and operation, as to the limits and boundaries of the lands conveyed, depend upon extrinsic parol evidence, its construction and effect should be stated to the jury hypothetically, so that they may pass upon the facts. *Humes v. Bernstein*, 547.

10. *Idem sonans*; whether question for court or jury.—Whether one name is *idem sonans* with another, notwithstanding a difference in the spelling of the two, is a question of fact for the determination of the jury, when it arises on the evidence under the plea of the general issue, and not a matter of law for the decision of the court. *Underwood v. The State*, 220.

CODE OF ALABAMA.

1. Statutes omitted from Code. *Sawyers v. Baker*, 49.
2. §§ 522-5. License and liability of innkeepers. *Beale v. Posey*, 323.
3. § 764. Constable's bond, filing and recording of. *Martin v. Hall*, 587.
4. §§ 1549-51. Liability of innkeepers. *Beale v. Posey*, 323.
5. §§ 1699, 1700. Liability of railroad company. *Ala. Gr. Southern Railroad Co. v. Hawk*, 112.
6. § 2121. Statute of frauds, as to contracts required to be in writing. *Jenkins v. Lovelace*, 303.
7. § 2124. Fraudulent and voluntary conveyances. *Keel v. Larkin*, 493.
8. §§ 2455. Sale of lands for payment of decedent's debts. *Gilchrist v. Shackelford*, 7; *Quarles v. Campbell*, 64; *Gayle's Adm'r v. Johnson*, 254.
9. §§ 2597-8. Statute of non-claim. *Jones v. Drewry*, 311.
10. § 2625. Appointment of administrator *ad litem*. *Gayle's Adm'r v. Johnson*, 254.
11. §§ 2637-38. Suits by foreign administrators. *Harris v. Moore*, 507; *Sloan v. Frothingham*, 539.
12. § 2691. Divorce on ground of abandonment. *Hendricks v. Hendricks*, 132.
13. § 2715. Wife's interest in husband's estate. *Wiggins v. Newberry*, 240.
14. § 2731. Removal of disabilities of coverture by decree in chancery. *Cohen v. Wollner, Hirschberg & Co.*, 233.
15. §§ 2830-48. Claim of exemption, and how contested. *Totten & Bro. v. Sale & Co.*, 488; *Keel v. Larkin*, 494; *Baker v. Keith*, 112; *Farley v. Riordon*, 128.
16. § 2892. Suits by husband and wife. *Sawyers v. Baker*, 49.
17. §§ 2951-54. Suggestion of adverse possession and erection of valuable improvements. *Humes v. Bernstein*, 546.
18. § 2963. Plea of not guilty in ejectment. *Callan v. McDaniel*, 96.
19. § 2984. Bill of particulars. *Hayes v. Woods*, 92.
20. § 3018. Struck jury in civil cases. *Dothard v. Denson*, 541.
21. § 3029. Waiver of jury. *Martin v. King*, 354.
22. § 3058. Competency of parties as witnesses, in actions by or against administrators, &c. *Keel v. Larkin*, 494; *Binford's Adm'r v. Dement*, 491; *Jenkins v. Lovelace*, 303.
23. § 3112. Nonsuit with bill of exceptions. *Hurst & McWhorter v. Bell & Co.*, 336.
24. § 3128. Costs in civil cases. *Esalava v. Farley*, 214.
25. § 3154. Amendment of clerical errors. *Whorley v. M. & C. Railroad Co.*, 20.
26. §§ 3161-68. Rehearing at law, on ground of fraud, accident, or mistake. *Ex parte O'Neal*, 560; *O'Neal v. Kelly*, 559.

CODE OF ALABAMA—*Continued.*

27. § 3209. Sale of mortgaged lands under execution. *Jenkins v. Lovelace*, 303.
28. § 3213. Levy of execution after the defendant's death. *Keel v. Larkin*, 494.
29. § 3225. Limitation of suit for injury to lands. *Nininger v. Norwood*, 277.
30. § 3226. Limitation of action for conversion of property. *Sullivan v. Lawler*, 74.
31. § 3226, subd. 7. Limitation of action against sureties of executor or administrator. *Martin v. Tally*, 23.
32. § 3231. Limitation of action against railroad company for personal injuries. *Ala. Gr. So. Railroad Co. v. Hawk*, 112.
33. §§ 3497-3507. Partition in Probate Court. *Ward v. Corbett*, 433.
34. § 3760. In what district bill may be filed. *Harwell v. Lehman, Durr & Co.*, 344.
35. § 3786. Weight of answer as evidence. *Buchanan v. Buchanan*, 55.
36. §§ 3801-04. Cross-bill and answer. *Gilman, Sons & Co. v. N. O. & S. Railroad Co.*, 566.
37. §§ 3837-39. Bill in chancery for correction of errors in probate decree. *Humphreys v. Burseson*, 1; *Lyne's Adm'r v. Wann*, 42; *Stoudenmire v. DeBardelaben*, 300.
38. § 3886. Bill in equity by creditor without lien. *Weis v. Goetter, Weil & Co.*, 259; *Harris v. Moore*, 507.
39. §§ 4071-93. Bastardy proceedings. *State v. Dorgan*, 173; *Nicholson v. State*, 176.
40. § 4207. Playing cards in public places. *Russell v. The State*, 222.
41. § 4214. Renting room for gaming purposes. *Poteete v. The State*, 558.
42. §§ 4304, 4306. Rape and carnal abuse of child. *Beason v. The State*, 191.
43. § 4343. Burglary. *Kelly v. The State*, 244.
44. § 4377. Embezzlement by clerk or bailee. *Washington v. The State*, 272; *P. & M. Insurance Co. v. Tuntall*, 142.
45. § 4414. Trespassing cattle. *Cole v. The State*, 216.
46. §§ 4613-14. Depositions of convicts in penitentiary. *P. & M. Insurance Co. v. Tunstall*, 142.
47. §§ 4695-97. Criminal proceedings before justice of the peace. *Ex parte Dunklin*, 241.
48. § 4732. Competency of jurors. *Sylvester v. The State*, 201.
49. § 4765. Oath of petit jury. *Walker v. The State*, 218.
50. § 4800. Averment of ownership in indictment. *White v. The State*, 195.
51. § 4872. Service of copy of indictment on prisoner. *Hubbard v. The State*, 164.
52. § 4874. Special jury in criminal case. *Hubbard v. The State*, 164.
53. § 4881. Competency of jurors. *Beason v. The State*, 191.

COMMON LAW.

1. *Presumption as to.*—In the absence of proof to the contrary, our courts will presume that the common law prevails in Pennsylvania, Illinois, or any other State having a common origin with our own. *Irwin v. Bailey*, 467.

CONFLICT OF LAWS.

1. *Administration of assets of deceased debtor.*—As against creditors, seeking to enforce satisfaction of their claims out of the assets of their deceased debtor, the administration of the assets is governed by the law of the place where the personal representative acts, and where he was appointed, without regard to the domicile of the

CONFLICT OF LAWS—Continued.

- creditor, or of the debtor at the time of his death. *Jones v. Drewry*, 311.
2. *Exemptions*.—As against creditors, the right to a homestead or other exemption, its value and extent, must be determined by the law which was of force when the debt was contracted; and when the creditor is a surety, by the law which was of force when his liability was assumed. *Keel v. Larkin*, 493.

CONSTITUTIONAL LAW.

1. *Taking private property for public uses; constitutional provisions as to pre-payment of compensation, right of appeal, and trial by jury*. The several clauses in the present constitution relating to the taking of private property for public uses by corporations or individuals (Art. I, § 24; Art. XIV, § 7), construed in connection with the pre-existing law and judicial decisions, were intended to secure just compensation to the owner of the property taken, and to compel its payment before the appropriation was complete; also, to secure the right of appeal from the preliminary assessment of damages, without regard to the character of the tribunal or body by which the assessment may be made; and the right to a trial by jury, on the demand of either party, when the error or matter complained of is the amount of damages assessed. *Mont. So. Railway Co. v. Sayre*, 443.
2. *Statutory proceedings for condemnation of right of way; appeal, and trial by jury*.—The statute regulating proceedings for the assessment of damages, when lands are taken by a railroad corporation for the right of way (Code, §§ 1833–40), was intended to carry into effect these constitutional provisions, and must be so construed, if possible, as to effectuate that intention, and to harmonize the statute with the constitution; and thus construing the section which gives an appeal to either party, and declares that “the same proceedings shall be had as in ordinary cases of appeal from the Probate [Court] to the higher courts of the State” (§ 1838), it must be held to give an appeal to the Circuit Court, of which a jury is a constituent, thereby securing the right to a trial by jury, if demanded. *Ib.* 443.
3. *Disfranchisement by conviction of larceny*.—The constitutional provision which disfranchises all persons who “shall have been convicted of treason, embezzlement of public funds, malfeasance in office, larceny, bribery, or other crime punishable by imprisonment in the penitentiary” (Art. VIII, § 3), while it applies to all felonies not specifically named, includes all grades of larceny, or other offenses particularly named, whether felonies or misdemeanors; consequently a person convicted of petit larceny is disfranchised and disqualified as a voter. *Anderson v. The State*, 187.
4. *Alienation of homestead; signature and acknowledgment by wife*. Under the provisions of the constitution of 1868, prior to the passage of the act approved April 23, 1873, a mortgage, or other alienation of the homestead, acknowledged by husband and wife, and certified in the form prescribed by the statute for ordinary conveyances, was sufficient to convey the homestead. *Butts v. Broughton*, 294.

CONTRACTS.

1. *Ambiguity; rules of construction*.—The law leans against the destruction of contracts on the ground of uncertainty, and a contract will not be declared void on that ground, unless, after reading and interpreting it in the light of the circumstances under which it was

CONTRACTS—*Continued.*

- made, and supplying or rejecting words necessary to carry into effect the reasonable intention of the parties, their intention can not be fairly collected and effectuated. *Boykin v. Bank of Mobile*, 262.
2. *Contract for sale of lands; sufficiency of description.*—A written agreement to sell "forty acres of land," without other descriptive words, is void for uncertainty. *Thompson v. Gordon*, 455.
 3. As to the rescission of contracts, see CHANCERY, 56, 57.
 4. As to the specific performance of contracts, see CHANCERY, 58-62.

CORPORATIONS.

1. *Municipal corporation; judicial notice of charter.*—The charter of a municipal corporation is a public statute, of which courts will take judicial notice. *City Council of Montgomery v. Wright*, 411.
2. *Same; duty to keep streets and side-walks in repair.*—The duty of keeping its streets and side-walks in repair, when imposed by statute on a municipal corporation, is unquestioned, and may exist without express statutory provision; and this duty extends to the whole width of those thoroughfares, and requires that they shall be kept in proper condition for safe travel by night as well as by day. *Ib.* 411.
3. *Same; action against, for damages; notice of defect in street or side-walk.*—To maintain an action against a municipal corporation for damages, on account of injuries resulting from its failure to keep the streets and side-walks in proper repair, the plaintiff must aver and prove actual notice of the defect in the street or side-walk, or facts from which constructive notice will be inferred; and such constructive notice may be inferred from the notoriety of the defect, and its continuance for such length of time as to raise the presumption that the proper municipal officers did in fact know, or with due vigilance and care ought to have known it. *Ib.* 411.
4. *Averment of corporate character and name.*—In an action against a municipal corporation, described by its corporate name, it is not necessary to aver in the complaint that the defendant is a body corporate, since the court will take judicial notice of that fact, and of the identity of the defendant as such corporation. *Ib.* 411.
5. *Averment of corporate duty to keep streets and side-walks in repair.* When the duty of keeping "the streets and highways in repair," is imposed on a corporation by its charter, it is only necessary to aver the existence of this duty by way of inducement, when declaring against the corporation for damages resulting from its breach; and this is done with sufficient certainty by the general allegation, "which the defendant is bound to keep in repair." *Ib.* 411.
6. *Contributory negligence; when not imputed to plaintiff.*—When the evidence shows that the route selected by plaintiff, at the time he was injured by a fall caused by a "wash-out" in the side-walk, was the route ordinarily travelled with safety by all persons on foot going in that direction, that the side-walk at that point was wide enough for safe passage on the inside of the "wash-out," and that there was no side-walk on the other side of the street; contributory negligence can not be imputed to him, because he had knowledge of the defect in the side-walk, and did not select a different route. *Ib.* 411.
7. *Parties to bill; corporation and its officers.*—When a bill in equity is filed by a creditor against a corporation, its directors and officers, against whom no relief is prayed, and against whom no fraud, con-

CORPORATIONS—*Continued.*

spiracy, or breach of trust is charged, can not be joined as defendants for the sole purpose of discovery. *Norwood v. M. & C. Railroad Co.*, 563.

See, also, RAILROADS.

COSTS.

1. *In chancery*.—In the imposition of costs, the chancellor exercises a legal discretion, governed by precedents and by general rules applicable to the varying circumstances of particular cases; and this discretion is fully exercised and exhausted, when a decree for the payment of costs is embodied in a final decree settling the equities of the case, defining and declaring the rights of the parties. *Ex parte Robinson*, 389.
2. *Same; final decree as to, not amendable or revisable at subsequent term*. While clerical errors may be corrected at a subsequent term, the sentence and judgment of the court—that which has been deliberately ordered and adjudged in the final decree—can not be changed or modified at a subsequent term; and this is as true of that part of the decree which adjudges the costs, as of any other part. *Ib.* 389.
3. *On petition for supersedeas of execution*.—When a petition is filed for the supersedeas of an execution, sued out by an assignee in the name of the original plaintiff, the assignee may be made a defendant thereto; and if he comes in voluntarily as a party, and is unsuccessful in resisting the supersedeas, costs may be adjudged against him, under the general statute (Code, § 3128), as the unsuccessful party in a civil suit. *Eslava v. Farley*, 214.
4. *Sureties for costs, by party resisting supersedeas of execution*.—There is no statute which requires the assignee of a judgment, when resisting the supersedeas of an execution sued out by him in the name of his assignor, to give security for the costs if unsuccessful, or which authorizes a summary judgment against sureties given by him voluntarily; yet he can not assign as error such summary judgment against his sureties, since it is not prejudicial to him. *Ib.* 214.
5. *Appeal or writ of error bond in Federal courts; costs recoverable on affirmance, though bond not operative as supersedeas*.—In an action on an appeal or writ of error bond, given on the removal of a judgment from a Circuit Court to the Supreme Court of the United States, and conditioned that the appellant or plaintiff "shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good" (U. S. Rev. Stat. §§ 1,000 *et seq.*), although the bond may not operate as a supersedeas of the judgment, a recovery may be had for the costs of the appeal, if the judgment is affirmed. *Crowder v. Morgan*, 535.

COURT AND JURY. See CHARGE OF COURT TO JURY, 7-9.

COURT OF PROBATE.

1. *Entry of judgment or decree; when properly made and dated*.—A decree of the Probate Court, rendered on the final settlement of an estate, usually embraces the findings of the court on both law and fact, and, like a decree in chancery, can not be known until it is officially announced by the judge; and it should bear date and take effect as of the time of said official announcement. But, when the probate of a will is contested, and an issue of *deviseavit vel non* is submitted to a jury, who find in favor of the will, the judgment necessarily follows the verdict, as in an action at law;

COURT OF PROBATE—*Continued.*

and the verdict being rendered on Saturday morning, while the court is in session, the judgment is properly entered and dated as of that day, although the entry was not actually made until ten o'clock at night, after the expiration of office hours. *Lanier v. Richardson*, 134.

2. *Jurisdiction in matter of trusts; conclusiveness of decree.*—Where the will confers on an executor personal trusts, which may not expire when his executorial duties cease, and which can not be finally settled until, on the termination of the widow's life-estate, the property is delivered to the remainder-men, unless the executor and trustee resigns, dies, or is removed; while the Probate Court may make a final settlement of his accounts as executor, and the decree would be conclusive on the widow, who was a party to it; yet, as to the matters connected with the trust, the court would be without jurisdiction, and the decree rendered would be no protection to the executor in any future litigation with the remainder-men who were not parties to it. *Pinney v. Werborn*, 58.
3. *Sale of decedent's lands to pay debts; jurisdiction of court, and conclusiveness of decree.*—The jurisdiction of the Probate Court to order a sale of lands belonging to a decedent's estate, for the payment of debts, attaches on the filing of a petition by the personal representative, showing a necessity for the sale; and when the jurisdiction of the court has thus attached, and an order of sale has been rendered, such order is conclusive as to the insufficiency of the personal assets, and the existence of debts for which the lands are liable, and it can not be collaterally impeached on account of irregularities in the proceedings. *Forworth v. White*, 224.
4. *Same; pleadings.*—In a proceeding before the Probate Court for an order to sell lands for the payment of debts, the technical rules of pleading can not be strictly applied. *Gayle's Adm'r v. Johnson*, 254.
5. *Jurisdiction to decree partition.*—Under its statutory power to make partition of lands among several joint owners or tenants in common (Code, §§ 3497-3507), the Probate Court has no jurisdiction to decree partition where the lands are not susceptible of division into equal parts, or parts of equal value; and this can not be done, where the parties own unequal interests—as, where one of four joint owners, or tenants in common, has conveyed a part of his undivided interest to another. (Overruling *Simpson v. Malone & Foote*, 60 Ala. 338.) *Ward v. Corbett*, 438.

CRIMINAL LAW.

APPEAL.

1. *By State.*—Under the statute giving the State a right of appeal in a criminal case, when the statute under which the indictment was found is held to be unconstitutional (Sess. Acts 1880-81, p. 65), the record must affirmatively show that the constitutionality of the statute was assailed by demurrer, and that the court held it to be unconstitutional; and when the record does not affirmatively show this, the appeal will be dismissed. *The State v. Bauerman*, 252.

BURGLARY.

2. *Sufficiency of indictment, in description of building, goods, &c.*—An indictment which charges that the defendant, with intent to steal, "broke into and entered the store of J. H., in which goods or merchandise, things of value, were at the time kept, for use, sale, or deposit" (Code, § 4343), is sufficient, without any further averment of the value of the goods. *Kelly v. The State*, 244.

CRIMINAL LAW—Continued.

3. *Averment of ownership of property.*—In an indictment for burglary, where the house broken into and entered belongs to several partners, joint owners, or tenants in common (Code, § 4800; Sess. Acts, 1878-79, p. 46), the ownership may be laid in any one or more of them. *White v. The State*, 195.

CARRYING CONCEALED WEAPONS.

4. *Charges on evidence, invading province of jury.*—A charge which assumes, as a fact, that "there is no proof as to whether the witness looked to see whether the defendant had a pistol or not," when the witness testified that he passed within a few feet of the defendant, while lying on the ground drunk, "but did not examine him," is properly refused; nor could it be affirmed, as matter of law, that unless the witness, while passing by, "looked to see whether the defendant had a pistol or not, there could be no inference that the pistol was then concealed," which another witness saw in his hand a short time previously. *Farley v. The State*, 190.

EVIDENCE.

5. *Confessions; when voluntary and admissible.*—A confession by a person accused is not necessarily voluntary and admissible, because the person to whom it was made testifies that he used no promises nor threats to induce a confession; nor, on the other hand, is it rendered involuntary and inadmissible, because the person to whom it was made, not being an officer, or in authority, exhorted him to speak the truth, or told him it would be better (or best) for him to tell the truth. *Kelly v. The State*, 244.
6. *Same.*—The witness in this case, testifying to the prisoner's confessions while in custody, said that he used no promises nor threats to induce a confession, but added: "I said to him, 'You have got your foot into it, and somebody else was with you; now, if you did break open the door, the best thing you can do is to tell all about it, and to tell who was with you, and to tell the truth, the whole truth, and nothing but the truth.' I wanted to produce the impression on his mind that it was best to tell all about it, and I did produce that impression before he would tell me." *Held*, that the confession ought to have been excluded. *Ib.* 244.
7. *Sufficiency of circumstantial evidence.*—The test of the sufficiency of circumstantial evidence, in a criminal case, is not whether it produces as full conviction as would be produced by the positive testimony of a single credible witness, but whether it satisfies the minds of the jury to the exclusion of every reasonable doubt. *Banks & Wood v. The State*, 522.
8. *Sufficiency of evidence, and charge as to conflict.*—If the jury entertain a reasonable doubt as to the truth or falsity of any material fact constituting a part of the testimony in a criminal case, the defendant is entitled to the benefit of that doubt, however small may be its influence; but this principle does not extend to a conflict in the testimony of two witnesses as to a collateral and immaterial matter. *White v. The State*, 195.
9. *As to presumption implied from failure to call witness.*—There is no rule of law which requires that, in cases of larceny or burglary, based on circumstantial evidence, the person who last had the rightful or innocent possession of the stolen property must be examined as a witness for the prosecution, or raises a presumption favorable to the defendant's innocence from the failure to examine such person as a witness. *Ib.* 195.
10. *Proof of venue; failure of record to show.*—When no instruction is

CRIMINAL LAW—*Continued.*

given or refused, involving an inquiry into the sufficiency of the evidence to authorize a conviction, or as to the proof of venue, the failure of the bill of exceptions to show that the venue was proved, while it purports to set out "substantially all the evidence," will not work a reversal of the judgment. *Hubbard v. The State*, 164.

GAMING.

11. *Playing cards at public places.*—A room in a house belonging to the proprietor of a hotel or tavern, and used by him at the time for the accommodation of guests, is appurtenant to the hotel or tavern, and within the statute against playing cards at hotels and other public houses and places (Code, § 4207), although situated on a separate lot, eighty or ninety feet from the hotel, and never before used for the accommodation of guests. *Russell v. The State*, 222.
12. *Allowing room to be used for gaming purposes; who is "owner or proprietor."*—Under the statute which makes it a penal offense for any person, "being the owner or proprietor of any house, room," &c., to rent or lease the same for gaming purposes, or knowingly to permit the same to be used for any such purpose (Code, § 4214), a conviction may be had against a person who has possession as a tenant or lessee. *Potter v. The State*, 558.

ILLEGAL VOTING.

13. *Disfranchisement by conviction of larceny.*—The constitutional provision which disfranchises all persons who "shall have been convicted of treason, embezzlement of public funds, malfeasance in office, larceny, bribery, or other crime punishable by imprisonment in the penitentiary" (Art. VIII, § 3), while it applies to all felonies not specifically named, includes all grades of larceny, or other offenses particularly named, whether felonies or misdemeanors; consequently a person convicted of petit larceny is disfranchised and disqualified as a voter. *Anderson v. The State*, 187.

INDICTMENT.

14. *Indorsements on indictment.*—The only evidence required by statute, as to the authenticity of an indictment, is the indorsement of the foreman of the grand jury; and the indorsement by the clerk, showing when it was filed in court, may be made at any time while the cause is *in fieri*. *Hubbard v. The State*, 164.
15. *Service of copy of indictment on defendant; sufficiency of copy.*—In preparing a copy of the indictment for service on the accused in a capital case (Code, § 4872), the clerk should include in the copy all the indorsements on the original; but the indorsement of the prosecutor's name, or of the fact that there is no prosecutor (*Ib.* § 4778), being matters which are merely directory, and the omission of which does not affect the sufficiency of the indictment, their omission from the copy does not affect its validity, and is not an irregularity which can prejudice the defendant. *Ib.* 164.
16. *Sufficiency of indictment; joinder of offenses; election by prosecution.*—In an indictment for rape, and for the statutory offense of having carnal knowledge of a female child under ten years of age, or the abuse of such child in the attempt to have carnal knowledge of her (Code, §§ 4304, 4306), it is sufficient to pursue the statutory forms (Nos. 7, 8, p. 992): the offenses may be joined, in different counts, in the same indictment; and the State can not be compelled to elect on which count it will proceed, when the evidence on the

CRIMINAL LAW—*Continued.*

- trial discloses that the female was over ten years of age when the offense was committed. *Beason v. The State*, 191.
17. *Averment and proof of ownership of thing stolen.*—In an indictment for larceny, the ownership of the property or thing stolen must be alleged, or the failure to allege it must be excused by proper averments; and a variance between the allegations and the proof is fatal to a conviction. *Underwood v. The State*, 220.
18. *Averment of ownership, and of principal's name, in indictment.*—In an indictment for embezzlement by an agent, the name of his principal must be alleged; and it is the safer practice, also, to allege the ownership of the property, though this averment may not be necessary, and must be proved as laid. *Washington v. The State*, 222.

JURORS AND JURY.

19. *Organization of grand jury; voluntary appearance of juror drawn but not summoned; summons of person not drawn.*—A person who was regularly drawn and selected as a grand juror, but was not summoned, may voluntarily appear, and thereby subject himself to the control of the court as if he had been summoned; and if a person is summoned who was not drawn and selected, and who does not appear, such summons does not work any irregularity in the organization of the grand jury. *Sylvester v. The State*, 201.
20. *Competency of juror; who is householder.*—A man who provides for his family, and lives with them in a house which belongs to his wife's statutory estate, of which he has control as husband and trustee, is a householder (Code, § 4735), and competent to serve as a juror. *Ib.* 201.
21. *Competency of juror.*—A juror is not subject to challenge for cause, merely because he has formed an opinion as to the guilt or innocence of the accused, which may be changed by the evidence; he is disqualified, only "when he has a fixed opinion which would bias his verdict." *Beason v. The State*, 291.
22. *Oath of petit jury.*—A recital in the judgment-entry, in a criminal case, that "the jury was sworn according to law to try the issue joined," does not show a substantial compliance with the statute (Code, § 4765), but negatives the idea that the proper oath was administered. *Walker v. The State*, 218.
23. *Special venire in capital case; what is revisable.*—The number of jurors to be summoned in a capital case is matter of discretion with the court, provided the number summoned, including the regular jurors for the week or term, is not less than fifty, nor more than one hundred (Code, § 4874); and the exercise of this discretion is not revisable on error. *Hubbard v. The State*, 164.
24. *Objection to venire, on account of mistakes in names of jurors.*—Mistakes in the names of persons summoned as jurors in a capital case, or discrepancies in their names between the venire and the copy served on the defendant, are not good ground for quashing the venire. *Ib.* 164.

LARCENY AND EMBEZZLEMENT.

25. *At common law, and by statute.*—At common law, embezzlement was a mere breach of trust, and not an indictable offense, unless the act amounted to larceny; and the statutes in reference to embezzlement by clerks, agents, &c. (Code, §§ 4377, '83, '84), embrace some acts which were larceny at common law, as well as acts which were mere breaches of trust. *P. & M. Insurance Co. v. Tunstall*, 142.

CRIMINAL LAW—*Continued.*

26. *Embezzlement, and fraudulent conversion of property, by agent; whether felony, or misdemeanor.*—An agent or servant who embezzles, or fraudulently converts to his own use, "any money or property which has come to his possession by virtue of his employment, must be punished, on conviction, as if he had stolen it" (Code, § 4377); and the larceny of an ox, or other domestic animal named in the statute, being now made a felony without regard to the value of the animal stolen (*Ib.* § 4358), the embezzlement of such animal by an agent is equally a felony without regard to value. *Washington v. The State*, 272.
27. *Averment of ownership, and of principal's name, in indictment.*—In an indictment for embezzlement by an agent, the name of his principal must be alleged; and it is the safer practice, also, to allege the ownership of the property, though this averment may not be necessary, and must be proved as laid. *Ib.* 272.
28. *Variance.*—Where the indictment alleges that the defendant embezzled property which came to his possession as the agent of S., while the proof shows that the property was placed in his possession by one T., who was the bailee of S., to be delivered to S., the variance is fatal, unless it is shown that S. ratified or recognized the appointment. *Ib.* 272.
29. *Possession of stolen goods by accused.*—Possession of stolen goods by the accused, even though unexplained and exclusive, does not authorize the inference of his complicity in the larceny or burglary charged, unless it is also recent, or soon after the commission of the offense; and while the word *recent*, in this connection, is not capable of any exact definition, but varies within a certain range, with the conditions of each particular case, and though there may be cases in which the court may, as matter of law, pronounce the possession recent; yet the question is usually one of fact for the determination of the jury, and a charge which ignores it, or withdraws it from their consideration, is erroneous. (*Overruling Maynard v. The State*, 46 Ala. 85.) *White v. The State*, 195.
30. *Same.*—The possession of stolen goods recently after the larceny, if unexplained, is a criminating fact, from which the jury may infer the defendant's complicity in the larceny; and the question of its sufficiency being for their determination alone, the court may refuse to instruct them that such unexplained recent possession, "without other circumstances tending to show felonious intent, does not amount to proof beyond a reasonable doubt of a larceny committed by the defendant." *Underwood v. The State*, 220.

MURDER.

31. *Conviction of murder in second degree.*—Under an indictment for murder in the usual form (Code, 991, Form No. 2), a verdict of guilty of murder in the second degree is an acquittal of the higher offense; and on a second trial, after the reversal of the judgment of conviction, although the defendant can not be convicted of murder in the first degree, the jury may find him guilty of the second degree on evidence showing his guilt in the first degree, and the court may so instruct them. *Sylvestre v. The State*, 201.
32. *Use of deadly weapon; presumption of malice.*—From the use of a deadly weapon, the law infers an intent to kill, or to do grievous bodily harm; and if the circumstances do not show excuse, justification, or immediate provocation, the presumption of malice is conclusively drawn. *Ib.* 201.
33. *Deadly weapon defined.*—A deadly weapon is not one a blow from which would ordinarily produce death, but one from which, as it

CRIMINAL LAW—Continued.

- was used in the particular case, death would probably result; and whether the weapon was, in its nature and character, a deadly weapon, is generally a matter of law for the decision of the court, and nota question of fact for the determination of the jury. *Ib.* 201.
34. *Dying declarations.*—When dying declarations are proved to have been made under a sense of impending death, their admissibility or effect as evidence is not impaired or affected by the fact that the family of the deceased thought at the time that he would recover; and proof of that fact is not relevant or admissible as evidence. *Ib.* 201.
35. *Appearance of defendant's clothing; relevancy as evidence.*—The absence of all appearance of blood on the clothing of the accused, immediately after the killing, is not a fact tending to his exculpation, when it is not shown, or attempted to be shown, that the nature and character of the wound inflicted on the deceased, or the circumstances under which it was inflicted, were such that stains of blood would probably have been found on the person or clothing of the perpetrator of the crime. *Ib.* 201.
36. *Flight of accused; relevancy of evidence.*—The flight of the accused, at or about the time he is accused or suspected, is relevant and admissible evidence against him, "the force of which depends on its connection with other criminating facts;" and as circumstances tending to show such flight, it may be proved that search was made for him at his reputed residence, and at places to which it might reasonably be presumed he had gone, and that he could not be found. *Ib.* 201.
37. *Relevancy of evidence connecting third person with killing.*—In a prosecution for murder, the evidence against the accused being altogether circumstantial, he may adduce evidence tending to show that the crime was in fact committed by another person; but such evidence, to be admissible, "must relate to, and be derived from the facts and circumstances of the killing;" and it is not permissible to prove, for this purpose, the hostile relations existing between the deceased and a third person, who is not shown to have had any agency in the homicide, or to have been near the place where it was committed at the time of its commission. *Banks & Wood v. The State*, 522.
38. *Abstract charge as to complicity of third person with crime.*—When there is no evidence whatever tending to connect any other person than the accused with the death of the child alleged to have been murdered, or with the concealment of its body where it was found, charges requested, based on the supposed complicity of some other person with the crime, are abstract, and are properly refused on that account. *Hubbard v. The State*, 164.
39. *To what witness may testify.*—On a trial under an indictment for infanticide, a witness who examined the dead body of the child may, though not an expert, testify that he "considered it fully developed;" this being a matter of fact open to observation, and the witness being subject to cross-examination as to his use of the words and his knowledge of their meaning. *Ib.* 164.

PLEAS AND DEFENSES.

40. *Former acquittal, or conviction.*—A former acquittal or conviction, pleadable in bar of another prosecution, pre-supposes a trial before a court having jurisdiction to render a judgment on the merits; and this effect can not be attributed to a decision rendered by a court whose authority is limited to the inquiry, whether there is sufficient cause shown for sending the accused to a court having

CRIMINAL LAW—*Continued.*

- jurisdiction to try and determine the charge. *Nicholson v. The State*, 176.
41. *Practice as to filing plea in abatement; what is revisable.*—Whether the defendant shall be permitted to withdraw the plea of not guilty, and interpose a plea in abatement on account of a misnomer, is matter of discretion with the court below, and is not revisable by this court. *Hubbard v. The State*, 164.
 42. *Misnomer and variance.*—The mere mis-spelling of a name, whether of the defendant or a third person, does not vitiate an indictment, and is not a fatal variance, unless the difference causes a material change in the pronunciation of the name. *Underwood v. The State*, 220.
 43. *Same; whether question for court or jury.*—Whether one name is *idem sonans* with another, notwithstanding a difference in the spelling of the two, is a question of fact for the determination of the jury, when it arises on the evidence under the plea of the general issue, and not a matter of law for the decision of the court. *Ib.* 220.
 44. *Misnomer; admission implied from silence.*—Issue being joined on the plea of misnomer in a criminal case, it is competent for the prosecution to prove, as an implied admission by the defendant, that he was arraigned and tried in the mayor's court by the same name alleged in the indictment, without interposing any objection on the ground of misnomer. *White v. The State*, 195.
 45. *Same; relevancy of evidence as to custom or usage.*—On the trial of such issue, the alleged misnomer being in the surname of the defendant, who was a young mulatto boy, and whose mother, testifying as a witness for him, was called by the surname of her former owner, and stated that his name was also the same, as alleged in his plea; evidence of the fact that, "after the war, negroes took their surnames from their former owners or masters, and negro children were called by the name of their mother's former owner or master," has no legitimate tendency to prove that the defendant thus acquired his surname, and is not relevant or admissible evidence for him. *Ib.* 195.

PRELIMINARY PROCEEDINGS.

46. *Proceedings before justice of the peace, under warrant of arrest.*—When a person is arrested on a charge of vagrancy, or other offense of which a justice of the peace has jurisdiction (Code, § 4628), and brought before a justice for trial, it is the duty of the justice, unless the defendant demands a trial by jury, "to determine both the law and the facts, and award the punishment which the law may demand" (§ 4697); but, if the defendant demands a trial by jury, the justice has no jurisdiction to try him, but is required to bind him over to appear at the next term of the Circuit (or City) Court, to answer the charge (§ 4695), and, on his failure to give bond as required, to commit him to the county jail until the next term of said court. *Ex parte Dunklin*, 241.
47. *Interrogating accused on preliminary examination.*—The practice of examining or interrogating an accused person, by the magistrate, pending the preliminary investigation or examination, is unwarranted by the principles of the common law, is not authorized by any existing statute, and is contrary to the spirit of the constitutional provision which declares that no person shall be compelled to give evidence against himself; and statements or confessions made by the accused, in response to questions thus propounded by the magistrate, are not competent evidence against him. *Kelly v. The State*, 244.

CRIMINAL LAW—*Continued.*

RAPE.

48. *Sufficiency of indictment ; joinder of offenses ; election by prosecution.* In an indictment for rape, and for the statutory offense of having carnal knowledge of a female child under ten years of age, or the abuse of such child in the attempt to have carnal knowledge of her (Code, §§ 4304, 4306), it is sufficient to pursue the statutory forms (Nos. 7, 8, p. 992); the offenses may be joined, in different counts, in the same indictment; and the State can not be compelled to elect on which count it will proceed, when the evidence on the trial discloses that the female was over ten years of age when the offense was committed. *Beason v. The State*, 191.

TRESPASSING CATTLE.

49. *Permitting stock to trespass on lands inclosed by common fence ; character of fence.*—Under the statute which makes it a misdemeanor for any person occupying or cultivating lands under a common fence with others, to "turn stock of any kind into such inclosure, or knowingly suffer such stock to go at large therein, without a sufficient guard to prevent injury to crops" (Code, § 4414), though the inclosing fence should be substantial, it is not necessary that it should be a statutory fence (*Ib.* § 1586). *Cole v. The State*, 216.
50. *Same ; constituents of offense.*—A conviction can not be had under this statute, on proof that the defendant, acting in good faith, suffered his hogs to range at large in an extensive woodland, adjoining the inclosed lands, whence they made their way into the inclosed lands through defects in the common fence. *Ib.* 216.
51. *Same ; damages and fine.*—The damages inflicted by the stock, which the statute declares "shall be held a part of the penalty imposed by the court, and shall go to the party injured," are not a part of the fine, but are given in addition to the fine. *Ib.* 216.

TRIAL AND ITS INCIDENTS.

52. *Setting day for trial ; presumption of continuance.*—If the trial is not begun on the day set for it, but on the next day, the record should properly show a continuance from one day to the other; and when the record is silent, such continuance will be presumed, in the absence of all evidence to the contrary, and of all objection in the court below. *Sylvester v. The State*, 201.
53. *Service of copy of indictment on defendant ; sufficiency of copy.*—In preparing a copy of the indictment for service on the accused in a capital case (Code, § 4872), the clerk should include in the copy all the indorsements on the original; but the indorsement of the prosecutor's name, or of the fact that there is no prosecutor (*Ib.* § 4778), being matters which are merely directory, and the omission of which does not affect the sufficiency of the indictment, their omission from the copy does not affect its validity, and is not an irregularity which can prejudice the defendant. *Hubbard v. The State*, 164.
54. *Objections to venire, on account of mistakes in names of jurors.*—Mistakes in the names of persons summoned as jurors in a capital case, or discrepancies in their names between the venire and the copy served on the defendant, are not good ground for quashing the venire. *Ib.* 164.
55. *Special venire in capital case ; what is revisable.*—The number of jurors to be summoned in a capital case is matter of discretion with the court, provided the number summoned, including the regular jurors for the week or term, is not less than fifty, nor more than

CRIMINAL LAW—*Continued.*

one hundred (Code, § 4874); and the exercise of this discretion is not revisable on error. *Ib.* 164.

56. *Presence of defendant in court when verdict is received.*—The recitals of the judgment in this case, representing the trial and all its incidents as one continuous, unbroken proceeding, and stating that the defendants were present in court when the trial was begun, show with sufficient certainty that they were also present when the verdict of the jury was returned and received. *Banks & Wood v. The State*, 522.
57. *Asking defendant to show cause, if any, against judgment on verdict.* When the record recites that, before sentence was pronounced on the defendants, each of them was asked what he had to say why the sentence of the law should not be pronounced on him, it will be presumed that the inquiry was made by the court, or in its presence, and by its authority, in proper form. *Ib.* 622.

CUSTOM. See CRIMINAL LAW, 45.

DAMAGES.

1. *Measure of damages for failure to deliver freight.*—In an action against a railroad company as a common carrier, for a failure to deliver goods received for transportation, the measure of damages is the value of the goods at the place of destination. *S. & N. Ala. Railroad Co. v. Wood*, 451.
2. *Same; proof of value of goods.*—In an action against a railroad company as a common carrier, to recover damages for its failure to deliver a quantity of corn, received by it for transportation from one intermediate station to another, about eighty miles apart, the value of the corn at the place of delivery to the railroad, at the time of its delivery, is relevant and competent evidence on the question of its value at the point of destination. (STONE, J., dissenting.) *Ib.* 451.

DEEDS.

1. *Description of premises in conveyance.*—When a conveyance of lands contains a particular description of the premises conveyed, by which they can be clearly identified, the insertion of other descriptive words, which are inapplicable, or incapable of definite application, will not be allowed to defeat it. *Whitehead & Son v. Lane & Bodley Company*, 39.
2. *Description of lands in sheriff's deed.*—A sheriff's deed for land sold under execution, described as "part of lot number seventy (70), fronting on Gallatin street fifty (50) feet, and extending eastwardly seventy-three (73) feet," though too indefinite to authorize a recovery, is not void on its face for uncertainty; but, the lot sold being further described as "the property of Isaac Jemison & Co.," and the dimensions of lot seventy (70) being shown, extrinsic evidence would be admissible to show that Jemison & Co. only owned a part of said lot corresponding with the dimensions given in the deed, and to identify that portion. *Humes v. Bernstein*, 546.
3. *Construction of deed, as to quantity of land conveyed.*—Where the lands conveyed by a deed are described by their subdivisions and numbers in the United States surveys, including fractional parts of several sections, with the words added, "making in all five hundred and twenty-seven acres," followed by a designation of the boundary lines on each side, as indicated by the adjacent lands and the river, and the price paid is a gross sum; the words specifying the quantity are mere matter of description, and not a covenant warranting the quantity. *Rogers v. Peebles*, 529.

DEEDS—Continued.

4. *Parol evidence varying or explaining deed.*—As between vendor and purchaser, in the absence of fraud or mistake, the deed executed and accepted must be regarded as the sole memorial and expositor of the terms of the contract between them, and parol evidence can not be received to vary, contradict, or explain it. *Ib.* 529.
5. *Parol evidence as to consideration of deed.*—The consideration clause of a deed is always open to unlimited explanation, except for two purposes: 1st, a party to the deed is not permitted to prove a consideration different from that expressed, if thereby the legal effect of the deed is varied; 2d, when payment of the consideration is recited in the deed, the grantor is not allowed, by disproving that recital, to establish a resulting trust in himself. *M. & M. Railway Co. v. Wilkinson*, 286.
6. *Same.*—The owner of land having conveyed a lot to a railroad company, reciting in the deed, as its consideration, "one dollar" in hand paid, "and the benefits which will arise to the grantor from the ownership by the grantee of the property hereby conveyed," the deed does not estop him from showing, as an additional consideration, that the grantee verbally agreed to grade a part of an adjacent lot belonging to the grantor, and to remove and rebuild that portion of his warehouse which was situated on the lot conveyed by the deed, and maintaining an action at law for the breach of such verbal agreement. *Ib.* 286.
7. *Effect of adverse possession on conveyance.*—To avoid a conveyance of lands made by one who is out of possession, on the ground of adverse possession in another, it is not necessary that the adverse possessor should have color of title, nor is it sufficient to show only the exercise of acts of ownership by him; to avoid the conveyance, he must be in adverse possession, "exercising acts of ownership, and claiming to be rightfully in possession." *Humes v. Bernstein*, 546.
8. *Construction and operation of deed; questions for court and jury.* The construction of a deed is always a question for the court; but, when its construction and operation, as to the limits and boundaries of the lands conveyed, depend upon extrinsic parol evidence, its construction and effect should be stated to the jury hypothetically, so that they may pass upon the facts. *Ib.* 536.
9. *Possession as evidence of title; unrecorded deed.*—The open, notorious, and exclusive possession of land by a purchaser, claiming the land as his own, though holding under an unrecorded deed, is constructive notice of his title, whether it be legal or equitable; but, if the purchaser and his vendor are both in possession when the deed is executed, and there is no change in the possession after its execution, a third person would not be charged with constructive notice of the deed, and would be entitled to protection against it. *McCarthy v. Nicrosi*, 332.
10. *Tax-sale; deed to purchaser, as color of title.*—When lands are sold for unpaid taxes, the deed to the purchaser, though it may be invalid as a conveyance of the title, is color of title, when possession has been taken and held under it; and is admissible as evidence for the grantee, or one holding under him, to show the extent of the possession according to the boundaries therein described. *Storall v. Fowler*, 77.
11. *Alienation of homestead; signature and acknowledgment by wife.* Under the provisions of the constitution of 1868, prior to the passage of the act approved April 23, 1873, a mortgage, or other alienation of the homestead, acknowledged by husband and wife, and certified in the form prescribed by the statute for ordinary convey-

DEEDS—Continued.

ances, was sufficient to convey the homestead. *Butts v. Broughton*, 294.

See, also, FRAUDULENT CONVEYANCES.

DEPOSITION.

1. *Of convicts in the penitentiary.*—The statutory provisions regulating the taking of depositions of convicts in the penitentiary (Code, §§ 4613-14), have no reference to their competency, but leave that to be determined by the general law. *P. & M. Insurance Co. v. Tunstall*, 142.
2. *Objection to competency of witness; when made, or waived.*—Cross-examining, without objection, a witness whose deposition is taken, is a waiver of objection to his competency; but, when there is no cross-examination, or filing of cross-interrogatories, the objection may be made at any time before the trial is begun. *Ib.* 142.
3. *Indorsement by commissioner, showing title of cause.*—The 64th Rule of Chancery Practice, requiring the commissioner to indorse on a deposition the title of the cause in which it is taken (Code, p. 170), is directory merely, and the failure to make such indorsement does not render the deposition inadmissible as evidence. *Quarles v. Campbell*, 64.
4. *Objections to evidence; when and how made.*—When interrogatories propounded to a party, as a witness in his own behalf, call for illegal evidence, objection should be taken before filing cross-interrogatories; but this rule does not prevail, when the illegality of the evidence is unknown, or is only disclosed by the answers. *Binford's Adm'r v. Dement*, 491.
5. *Same.*—Objecting to interrogatories which call for illegal evidence, without more, is not sufficient to bring before the chancellor the question of the admissibility of the evidence: there must be, also, written exceptions signed by counsel, specifying the portions of the testimony sought to be suppressed. *Ib.* 491.
6. *Same.*—Motions to suppress testimony, founded on exceptions duly filed, are properly heard before entering on the trial; or, by consent, they may be heard and determined in connection with the main cause; but, when the parties proceed to a hearing by agreement, stipulating that the chancellor may disallow all illegal evidence, this "rather loose practice has a tendency to cast on the chancellor so much unnecessary labor, that he may very justly refuse to act on such agreement." *Ib.* 491.

DIVORCE.

1. *Proof of residence.*—By express statutory provision (Code, § 2691), a divorce can not be granted on the ground of voluntary abandonment, unless it is alleged and proved that the party applying for it, whether husband or wife, has been a *bona fide* resident of this State for three years next before the filing of the bill; and the statute being intended to guard against frauds on the jurisdiction of the court, while the fact of such residence may, like any other fact, be proved by circumstances, the court will not act upon proof of circumstances which are not in themselves conclusive. when it is apparent that the fact, if it exists, can be established by direct and indisputable evidence. *Hendricks v. Hendricks*, 132.

DOWER.

1. *When widow, having separate estate, is not entitled to.*—When it is shown that the value of the husband's lands does not exceed \$350,

DOWER—Continued.

and that the widow owned, at the time of her husband's death, lands worth more than \$100 as her statutory estate (Code, § 2715), she is not entitled to dower. *Wiggins v. Newberry*, 240.

EASEMENT.

1. *Flow of waters from upper lands upon lower.*—When two adjacent tracts of land belong to different persons, the upper or dominant tract has a natural easement or servitude in the lower, for the discharge of all waters falling or accumulating from natural causes on the surface; and any interference with this right, or obstruction of it, by the owner of the lower tract, by the erection of an embankment on his own land, whereby the waters are thrown back upon the upper tract, or their natural flow obstructed, is a private nuisance which a court of equity will enjoin and abate. *Nininger v. Norwood*, 277.
2. *Easement in private sewer.*—A written contract between the owners of two adjacent lots, by which it is stipulated that a sewer shall be constructed, at their joint expense, through the lower lot, for the drainage of water from the upper, operates in the nature of a grant, and passes to the owner of the upper lot, when the sewer has been constructed, a private easement in the lower, or an incorporeal interest in the soil over which the sewer runs. *McCarthy v. Niccoli*, 332.
3. *Revocation of easement.*—A sewer having been constructed through defendant's lot, at the joint expense of himself and plaintiff (who owned the adjoining upper lot), under a written agreement entered into while defendant was an infant, his disaffirmance of the contract on attaining his majority would operate as a revocation of the easement created by it; and plaintiff's continued use of the sewer after such disaffirmance and revocation, would be a nuisance, which defendant might abate by obstructing the sewer. *Ib.* 332.

EJECTMENT.

1. *When mortgagee may maintain ejectment; demand, or notice to quit.* After the law-day of a mortgage, default having been made in the payment of the secured debt, the mortgagee may maintain ejectment for the property, without a previous demand, or notice to quit first given to the mortgagor. *Straug v. Moog*, 460.
2. *What will sustain action* —A charge given, instructing the jury that, "before they can find for the plaintiff, they must be convinced from the evidence that he was seized and possessed of the lands sued for before the bringing of this suit, and that since said possession accrued defendant dispossessed him,"—though susceptible of a construction which, by requiring actual possession on the part of the plaintiff, as an essential element of his right to recover, would assert an erroneous proposition, is yet susceptible also of another construction, which would assert a correct proposition—that is, that the plaintiff must have had a seizure in law, giving him a constructive possession, or drawing to it the right of immediate possession. *Callan v. McDaniel*, 96.
3. *Disclaimer, or statement limiting plea of not guilty.*—In ejectment, or the statutory action in the nature of ejectment, when the defendant disclaims as to a portion of the premises sued for, he is required to "state distinctly upon the record the extent of his possession" (Code, § 2963); which statement must designate with reasonable certainty the part as to which he disclaims, or the part as to which he defends, and, if wanting in that requisite certainty, may be stricken from the record on motion, leaving the plea of

EJECTMENT—*Continued.*

not guilty to operate as an admission of possession of the entire premises; but it is not subject to demurrer, on account of such uncertainty or indefiniteness. *Ib.* 96.

4. *Possession as evidence of title.*—A plaintiff in ejectment may recover upon proof of possession merely, as against an intruder or trespasser, or one who does not show a better right; but possession is presumed, in the absence of all evidence to the contrary, to be rightful, and in subordination to the true title; and the burden of proving it to be adverse, as against the owner of the legal title, is on the party asserting it. *Dothard v. Denson*, 541.
5. *Claim for valuable improvements, and liability for rent.*—When the defendant suggests on the record adverse possession for three years before the commencement of the suit, and the erection of valuable improvements, the statute makes provision for the manner in which, if the suggestion is found true, the value of the improvements and of the use and occupation of the land shall be set off against each other (Code, §§ 2951-54); but, he is not entitled to compensation for such improvements, unless they were erected under "the bona fide belief that the property was his;" and if the jury find that he erected them "in the mistaken but honest belief that the land was covered by his deed, but with no intention of claiming the lot if not embraced in his deed, then he will be entitled to the value of his improvements, but must answer for rents during the time they were being put up." *Humes v. Bernstein*, 545.

ELECTION.

1. *Election by creditor, to take under or against assignment.*—A creditor, secured by an assignment of property voluntarily executed by the debtor, may elect whether he will accept its provisions, or will assert his rights independent of it; but he must accept or reject it as an entirety, and can not accept it in part and repudiate it in part—he can not claim both under and against it. *Hatchett v. Blanton*, 423.
2. *Same.*—A general recital in the assignment, that it is the purpose and intention of the grantor to appropriate the property assigned to the payment of partnership and individual debts as a court of equity would marshal the assets, does not authorize the court, at the instance of a secured creditor, to change or subvert the uses expressly declared, and to appropriate property to the payment of partnership debts, on the ground that it is in fact partnership property, when the deed treats it as individual property, and directs its appropriation first to the payment of individual debts. *Ib.* 423.
3. *Ratification of unauthorized sale.*—It is a plain principle of right and justice, that where there is an unauthorized sale of property, real or personal, the owner can not take and hold the purchase-money, and yet reclaim the property; if, with knowledge of the facts, he elects to take the benefits of the sale, he can not afterwards repudiate it, to the injury of the purchaser; and this principle applies equally to void and voidable sales. *Sloan v. Frothingham*, 589.

ERROR AND APPEAL:

1. *When appeal lies.*—According to the settled practice of this court, an appeal lies from an order refusing to grant a statutory rehearing after final judgment at law (Code, §§ 3160-68), because such refusal is a final judgment; but, if a rehearing is improperly granted, the remedy for the correction of the error, before final judgment in the case, is by mandamus. *O'Neal v. Kelly*, 559.
2. *When appeal lies from nonsuit.*—An appeal is given by statute from a judgment of nonsuit, when taken on account of the adverse rulings of the court on questions arising during the trial which do not

ERROR AND APPEAL—Continued.

- appear of record, and which must be reserved by bill of exceptions (Code, § 3112); but the statute does not apply to rulings on the pleadings, which are a part of the record proper. *Hurst & McWhorter v. Bell & Co.*, 356.
3. *Appeal by State*.—Under the statute giving the State a right of appeal in a criminal case, when the statute under which the indictment was found is held to be unconstitutional (Sess. Acts 1880–81, p. 65), the record must affirmatively show that the constitutionality of the statute was assailed by demurrer, and that the court held it to be unconstitutional; and when the record does not affirmatively show this, the appeal will be dismissed. *The State v. Bauerman*, 252.
 4. *Appeal or writ of error bond in Federal courts; costs recoverable on affirmance, though bond not operative as supersedeas*.—In an action on an appeal or writ of error bond, given on the removal of a judgment from a Circuit Court to the Supreme Court of the United States, and conditioned that the appellant or plaintiff "shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good" (U. S. Rev. Stat. §§ 1,000 *et seq.*), although the bond may not operate as a *supersedeas* of the judgment, a recovery may be had for the costs of the appeal, if the judgment is affirmed. *Crowder v. Morgan*, 535.
 5. *Same; when operative as supersedeas*.—Under the United States statutes regulating writs of error and appeals (Rev. Stat. §§ 1,000 *et seq.*), as judicially construed by the Federal courts, the bond does not operate as a *supersedeas* of the judgment, unless it is approved by a justice or judge of the Circuit Court, and a copy of the writ of error is deposited, for the adverse party, with the clerk of said court. *Id.* 535.
 6. *Transcript; what is part of record*.—On appeal from a decree rendered on final settlement of an executor's accounts, a paper copied into the transcript, purporting to be the last will and testament of the decedent, but not appearing to have been admitted to probate, nor made a part of the record by bill of exceptions or appropriate reference, can not be considered for any purpose. *Pinney v. Werborn*, 58.
 7. *Same; bill of particulars*.—"A list of the items composing the account sued on" (Code, § 2984), like a bill of particulars at common law, is not a part of the record, unless made so by bill of exceptions; and when not so presented, it can not be considered by this court for any purpose. *Hayes v. Woods*, 92.
 8. *Contents of transcript*.—The court criticises the manner in which the transcript in this case is made out, condemning the repetition of the record of a chancery suit twice copied, and declaring "there never was any occasion for making the opinion of this court in that case a part of the record." *Lipscomb v. McClellan*, 151.
 9. *Transcript; copy of opinion on former appeal*.—On a second appeal in a chancery cause, the copy of the former opinion of this court, which was certified to the lower court for its guidance, should not be included in the transcript; and if included, no costs will be allowed for it. *Lake v. Security Loan Association*, 207; *Life Association v. Neville*, 517.
 10. *What is available on error*.—On appeal from a decree sustaining a demurrer to a bill for want of equity, this court will consider only the causes of demurrer specifically assigned, and will not regard other defects which are amendable; at least, when the bill is not fatally wanting in equity. *Humphreys v. Burleson*, 1.
 11. *Error without injury in admission of evidence*.—Error in the exclusion of a deed as evidence, when offered in connection with the certificate of acknowledgment only, is cured by the subsequent ad-

ERROR AND APPEAL—*Continued.*

- mission of the deed on proof of execution by the attesting witnesses. *Callan v. McDaniel*, 96.
12. *Errors not prejudicial to appellant.*—An appellant can only complain of errors which are prejudicial to him; hence, in a chancery cause, a controversy arising between two or more defendants under a cross-bill, one of them can not assign as error the dismissal of the original bill. *Gilman, Sons & Co. v. N. O. & S. Railroad Co.*, 566.
 13. *Same.*—A party can assign as error only matters which are prejudicial to him; erroneous rulings, prejudicial to others, but not injurious to him, are not available to reverse the judgment. *Eslava v. Farley*, 214.
 14. *Error without injury in overruling demurrer.*—When persons who have no interest in the subject-matter of the suit, and against whom no relief is prayed, are improperly joined as defendants to a bill, the misjoinder is a defense personal to them, and the other defendants can not take advantage of it; but, if the other defendants demur on account of such misjoinder, a decree sustaining the demurrer, but without dismissing the bill, is error without injury to the complainant. *Norwood v. M. & C. Railroad Co.*, 563.
 15. *Revision of judgment on facts.*—When a question of fact, arising on the hearing of a motion, is necessarily submitted to the decision of the court without the intervention of a jury, the decision will not be reversed by this court on appeal, unless it is clearly erroneous. *Totten & Bro. v. Sale & Co.*, 488.
 16. *Chancellor's opinion and decree differing.*—When the chancellor's written opinion, accompanying his decree, goes beyond the decree, an affirmance of his decree by this court is not an affirmance of the opinion; and a repugnancy between that opinion and his second decree, rendered after the affirmance, is not available as error on a second appeal. *McWilliams v. Jenkins*, 480.
 17. *Revision of chancellor's decision on facts.*—This court will not disturb the chancellor's decision on a disputed question of fact, when the record does not clearly show that he erred. *Butts v. Broughton*, 294.
 18. *Same.*—This general rule applies in this particular case with greater force than usual, since the chancellor had before him the original writing, the genuineness of which was in issue, and other writings admitted to be genuine, none of which are before this court. *Moon's Adm'r v. Crowder*, 79.
 19. *Revision of chancellor's rulings on exceptions to register's report.*—On appeal from the chancellor's decree overruling exceptions to the register's report upon matters of account, dependent upon the register's conclusions from the evidence adduced before him, this court will indulge all reasonable presumptions in favor of the register's rulings, and will not disturb them unless they are clearly shown to be wrong. *Winter v. Banks*, 409.
 20. *What is revisable in criminal case.*—The number of jurors to be summoned in a capital case is matter of discretion with the court, provided the number summoned, including the regular jurors for the week or term, is not less than fifty, nor more than one hundred (Code, § 4874); and the exercise of this discretion is not revisable on error. *Hubbard v. The State*, 164.
 21. *Same.*—Whether the defendant shall be permitted to withdraw the plea of not guilty, and interpose a plea in abatement on account of a misnomer, is matter of discretion with the court below, and is not revisable by this court. *Ib.* 164.
 22. *Presumption in favor of judgment.*—When objection is made to the competency of a witness, on account of a conviction of embezzlement, and the objection is sustained by the court below, this court

ERROR AND APPEAL.—*Continued.*

will not indulge the presumption, unless the record repels it, that the act would have been larceny at common law. *P. & M. Insurance Co. v. Tunstall*, 142.

23. *Same.*—On final settlement of an executor's accounts, when the record shows that the decedent left a widow and minor child surviving him, and the decree recites that the infant, "under the construction of the will of the deceased, is not a necessary party to the settlement," but the will itself is not set out, nor its provisions any where shown by the record; this court can not assume, contrary to these recitals, that the decedent died intestate, thereby making the child a necessary party as a distributee, nor that the will, properly construed, made the child a necessary party as a legatee or devisee. *Pinney v. Werborn*, 58.

ESTATES OF DECEDENTS.

1. *Administration of assets; governed by what law.*—As against creditors, seeking to enforce satisfaction of their claims out of the assets of their deceased debtor, the administration of the assets is governed by the law of the place where the personal representative acts, and where he was appointed, without regard to the domicile of the creditor, or of the debtor at the time of his death. *Jones v. Drewry*, 311.
2. *Statute of non-claim; foreign debts.*—The statute of non-claim enacted in 1815, which continued in force until the adoption of the Code of 1852, expressly excepted from its operation "debts contracted out of this State" (Clay's Dig. 195, § 17); but this exception being entirely omitted from the present statute (Code, §§ 2597-8), the courts have no power to incorporate it. *Ib.* 311.
3. *Same; conclusiveness of judgment or decree.*—A judgment and decree rendered in an administration suit in Virginia, where the deceased debtor died, however conclusive against the widow, heirs and devisees, who were parties to the suit, as to the validity and justness of the claims of creditors which were presented and allowed, can not prevent the operation of the Alabama statute of non-claim, when pleaded by them and the personal representative appointed here, in bar of a suit here instituted to enforce satisfaction of the claims out of lands in Alabama. *Ib.* 311.
4. *Petition to sell lands for payment of debts; pleadings and defenses.* In a proceeding before the Probate Court for an order to sell lands for the payment of debts, the technical rules of pleading can not be strictly applied. It is not necessary that the petition should particularly describe the debts, to the payment of which the lands are sought to be subjected; the answer of the heir or devisee, denying the existence of the asserted debts, may be in terms equally general; and on the issue thus formed, the burden of proof being on the administrator, if the debts proved are open to any legal defense, which would be available against an action by the creditor, that defense is equally available to the heir or devisee. *Gayle's Adm'r v. Johnston*, 254.
5. *Parties to proceeding; appointment of administrator ad litem.*—On an application by an administrator for an order to sell lands for the payment of debts, which is contested by the heirs or devisees, the administrator is their adversary, whether he is personally a creditor or not; and there can be no necessity for the appointment of a special administrator *ad litem* (Code, § 2625). *Ib.* 254.
6. *Averments of petition, as to debts and insufficiency of personal assets.* A petition by an executor, or administrator, for an order to sell lands for the payment of debts (Code, §§ 2450, 2455), must allege, among other things, the existence of debts, their actual or esti-

ESTATES OF DECEDENTS—*Continued.*

- mated amount, and the insufficiency of the personal assets to pay them; though it is not necessary to give a particular description of either the debts or the assets, that being mere matter of proof. *Quarles v. Campbell*, 64.
7. *Proof of "necessity for sale."*—The "necessity for the sale"—that is, the existence and amount of valid debts, and the insufficient value of the available personal assets—must be proved by the depositions of disinterested witnesses, testifying to facts within their personal knowledge; but it is not necessary to prove affirmatively that the witnesses are disinterested, since that fact will be presumed in the absence of proof to the contrary. *Ib.* 64.
 8. *Sale of lands to pay debts; jurisdiction of court, and conclusiveness of decree.*—The jurisdiction of the Probate Court to order a sale of lands belonging to a decedent's estate, for the payment of debts, attaches on the filing of a petition by the personal representative, showing a necessity for the sale; and when the jurisdiction of the court has thus attached, and an order of sale has been rendered, such order is conclusive as to the insufficiency of the personal assets, and the existence of debts for which the lands are liable, and it can not be collaterally impeached on account of irregularities in the proceedings. *Forworth v. White*, 224.
 9. *Description of lands in petition.*—"Eighty acres of land, lying north of Courtland, and east of Lamb's Ferry road," without other descriptive words in the petition, is not a sufficient description of the lands sought to be sold (Code, § 2450), but is void for indefiniteness and uncertainty. *Gilchrist v. Shackelford*, 7.
 10. *Averments of bill by purchaser, to compel conveyance of legal title.* When a purchaser, or sub-purchaser, of lands sold by an administrator under an order or decree of the Probate Court, files a bill in equity in the nature of a bill for specific performance, seeking to obtain a conveyance of the legal title from the heirs, and to enjoin an action at law by a succeeding administrator, he must aver and prove the facts which gave the court jurisdiction to order the sale; and the averment of mere legal conclusions—as, "appropriate allegations," "proper parties," "legal grounds," etc.—is not sufficient. *Ib.* 7.
 11. *Proof of proceedings authorizing sale.*—When the averments of the bill are denied, the onus of proving the facts necessary to support the order and sale is on the complainant; and these facts are properly proved by a transcript from the record of the Probate Court, if in existence; and if the record has been lost or destroyed, it must be proved as other disputed facts are proved. *Ib.* 7.
 12. *Application of purchase-money to debts of estate; correspondence of allegations and proof.*—If the complainant fails to prove the facts necessary to sustain the validity of the sale, he can not have relief because the proof shows that the purchase-money was applied in paying the debts of the estate, when the fact is not averred in the bill. *Ib.* 7.
 13. *Decedent's estate; removal of settlement into equity.*—The settlement of a decedent's estate can not be removed into equity by the personal representative, in any case, or at any time, without the assignment of some particular ground of equitable jurisdiction; nor can it be removed at the instance of a distributee, or other party beneficially interested, after the jurisdiction of the Probate Court has attached and commenced to be exercised, unless some question of special equitable cognizance is involved, which the Probate Court is incompetent to determine. *Shackelford v. Bankhead*, 476.
 14. *Insolvent estate; removal of settlement into equity.*—When a decedent's estate has been declared insolvent, it requires a very clear

ESTATES OF DECEDENTS—*Continued.*

and strong case to justify the removal of the settlement into a court of equity. *Ib.* 476.

15. *Same.*—The omission from the inventory of property which ought to have been included, the waste or conversion of assets, and the failure to make a settlement, being matters which are within the jurisdiction of the Probate Court, and as to which its powers are fully adequate to grant relief, furnish no ground for a resort to a court of equity by a creditor. *Ib.* 476.

ESTOPPEL.

1. *By deed.*—The owner of land having conveyed a lot to a railroad company, reciting in the deed, as its consideration, "one dollar" in hand paid, "and the benefits which will arise to the grantor from the ownership by the grantee of the property hereby conveyed," the deed does not estop him from showing, as an additional consideration, that the grantee verbally agreed to grade part of an adjacent lot belonging to the grantor, and to remove and rebuild that portion of his warehouse which was situated on the lot conveyed by the deed, and maintaining an action at law for the breach of such verbal agreement. *M. & M. Railway Co. v. Wilkinson*, 286.
2. *Equitable estoppel.*—Where a mortgagee of lands indorses on the mortgage a receipt for the secured debt before its maturity, and intrusts it to the possession of the mortgagor, pursuant to an agreement between them; and the mortgagor, being in possession of the lands, sells and conveys them to a third person, to whom he also shows the mortgage and indorsement thereon; the mortgage can not be established and enforced against such purchaser, after he has paid the purchase-money without notice of the agreement. *Turner v. Flinn*, 532.
3. As to the conclusiveness of judgments, see JUDGMENTS AND DECREES.

EVIDENCE.

ADMISSIBILITY AND RELEVANCY.

1. *Map, or diagram; when admissible as evidence.*—A surveyor, or expert, testifying as to the form, configuration, or dimensions of the land in controversy, may introduce a map or diagram, made by himself, to aid in making his testimony intelligible; and such map or diagram may then be submitted to the jury, to aid them in understanding or remembering his testimony. But such map or diagram is not *prima facie* or presumptively correct, unless prepared by a county surveyor, after notice to the party in adverse interest, as provided by the statute (Code, § 868); and not having been so prepared, but made by the witness without having the title-papers before him, and admitted by him, on examination of the deeds, to be incorrect, it should not be allowed to go to the jury for any purpose. *Humes v. Bernatein*, 546.
2. *Evidence as to terms of agreement for transfer of note as collateral security.*—In an action against the maker of a negotiable promissory note, proved to have been given for the accommodation of the payees, and by them transferred to the plaintiff bank as collateral security for a loan; the defense being want of consideration, and the terms of the agreement for the transfer being controverted—whether it was subsequent to the loan, or was made under an agreement contemporaneous with the loan; the fact that no portion of the money loaned was drawn out of the bank until after the transfer of the note, is relevant and competent evidence for the plaintiff. *Boydin v. Bank of Mobile*, 262.

EVIDENCE—Continued.

3. *Proof of value of goods.*—In an action against a railroad company as a common carrier, to recover damages for its failure to deliver a quantity of corn, received by it for transportation from one intermediate station to another about eighty miles apart, the value of the corn at the place of delivery to the railroad, at the time of its delivery, is relevant and competent evidence on the question of its value at the point of destination. (Storke, J., dissenting.) *S. & N. Ala. Railroad Co. v. Wood*, 451.
4. *Evidence as to conduct of servant charged with larceny of guest's money, in action against innkeeper.*—In an action by a guest against an innkeeper, for the loss of money, the conduct, demeanor or appearance of a servant at the hotel, while on trial charged with the larceny, though it might be competent evidence against himself as an implied admission or confession, is not admissible against the defendant, his employer. *Beale v. Posy*, 323.
5. *Proof of handwriting by comparison.*—When the genuineness of a writing or signature is disputed, extraneous writings, though admitted to be genuine, can not be presented to the court or jury, nor shown to a witness, that he may institute a comparison between them and the disputed one. *Moon's Adm'r v. Crowder*, 79.
6. *Testimony taken before cause is at issue.*—Testimony taken in a chancery cause before the cause is at issue as to a material defendant, is not admissible as evidence against him for any purpose. *Harris v. Moore*, 507.
7. *Appearance of defendant's clothing; relevancy as evidence.*—The absence of all appearance of blood on the clothing of the accused, immediately after the killing, is not a fact tending to his exculpation, when it is not shown, or attempted to be shown, that the nature and character of the wound inflicted on the deceased, or the circumstances under which it was inflicted, were such that stains of blood would probably have been found on the person or clothing of the perpetrator of the crime. *Sylrester v. The State*, 201.
8. *Flight of accused; relevancy of evidence.*—The flight of the accused, at or about the time he is accused or suspected, is relevant and admissible evidence against him, "the force of which depends on its connection with other criminating facts;" and as circumstances tending to show such flight, it may be proved that search was made for him at his reputed residence, and at places to which it might reasonably be presumed he had gone, and that he could not be found. *Ib.* 201.
9. *Misnomer; relevancy of evidence as to custom or usage.*—On the trial of such issue, the alleged misnomer being in the surname of the defendant, who was a young mulatto boy, and whose mother, testifying as a witness for him, was called by the surname of her former owner, and stated that his name was also the same, as alleged in his plea; evidence of the fact that, "after the war, negroes took their surnames from their former owners or masters, and negro children were called by the name of their mother's former owner or master," has no legitimate tendency to prove that the defendant thus acquired his surname, and is not relevant or admissible evidence for him. *White v. The State*, 195.
10. *Recent possession of stolen goods; effect of, as criminating circumstance.* *Underwood v. The State*, 230; *White v. The State*, 195.

ADMISSIONS; CONFESSIONS; DECLARATIONS.

11. *Bill in equity; when admissible as evidence in another suit.*—A bill in equity, not sworn to, is regarded as the mere suggestion of counsel, and is not admissible as evidence against the complainant in another suit; but, when duly sworn to by him, it is an admis-

EVIDENCE—Continued.

- sion of the facts therein stated, and admissible as evidence against him in another suit. *Callan v. McDaniel*, 96.
12. *Answer in chancery; whole admissible, when part has been read.*—When parts of an answer to a bill in equity have been read in another suit as evidence against the respondent, he has the right to read the whole of it as evidence. *Ib.* 96.
13. *Agent's admissions or declarations; when admissible as evidence against principal.*—The admissions or declarations of an agent are admissible as evidence against his principal, only when made in the discharge of his duties as agent, and so closely connected with the main transaction in issue as to constitute a part of the *res gestæ*. *Ala. Gr. So. Railway Co. v. Hawk*, 112.
14. *When declarations are part of res gestæ.*—In determining whether declarations fall within the principle of *res gestæ*, while it is not necessary that they should be strictly contemporaneous with the main facts in issue, they must be so nearly coincident in point of time as to grow out of that fact, to elucidate it, and to explain its character and quality, and must be so closely connected with it as to virtually constitute but one entire transaction. *Ib.* 112.
15. *Declarations of conductor and engineer; when admissible against railroad company.*—In an action against a railroad company, to recover damages for personal injuries sustained by a passenger, a witness for the plaintiff can not be allowed to testify, that the conductor, "a few minutes after the plaintiff had been hurt, asked the engineer why he did not respond to the bell-call; and that the engineer answered, he did respond to all the bell-call he heard." *Ib.* 112.
- [16. *Misnomer; admission implied from silence.*—Issue being joined on the plea of misnomer in a criminal case, it is competent for the prosecution to prove, as an implied admission by the defendant, that he was arraigned and tried in the mayor's court by the same name alleged in the indictment, without interposing any objection on the ground of misnomer. *White v. The State*, 195.
17. *Confessions; when voluntary and admissible.*—A confession by a person accused is not necessarily voluntary and admissible, because the person to whom it was made testifies that he used no promises nor threats to induce a confession; nor, on the other hand, is it rendered involuntary and inadmissible, because the person to whom it was made, not being an officer, or in authority, exhorted him to speak the truth, or told him that it would be better (or best) for him to tell the truth. *Kelly v. The State*, 244.
18. *Same.*—The witness in this case, testifying to the prisoner's confessions while in custody, said that he used no promises nor threats to induce a confession, but added: "I said to him, 'You have got your foot in it, and somebody else was with you; now, if you did break open the door, the best thing you can do is to tell all about it, and to tell who was with you, and to tell the truth, the whole truth, and nothing but the truth.' I wanted to produce the impression on his mind that it was best for him to tell all about it, and I did produce that impression before he would tell me." *Held*, that the confession ought to have been excluded. *Ib.* 244.
19. *Interrogating accused on preliminary examination.*—The practice of examining or interrogating an accused person, by the magistrate, pending the preliminary investigation, is unwarranted by the principles of the common law, is not authorized by any existing statute, and is contrary to the spirit of the constitutional provision which declares that no person shall be compelled to give evidence against himself; and statements or confessions made by the accused, in response to questions thus propounded by the magistrate, are not competent evidence against him. *Ib.* 244.

EVIDENCE—*Continued.*

20. *Declarations of person in possession of land.*—The declarations of a person in possession of land, as to the nature and character of his possession, are competent evidence in his favor; but his statements as to the person from whom he bought it, and as to the price paid, are merely narrative of a past transaction, and are not admissible as evidence. *Dothard v. Denson*, 541.
21. *Proof of transactions with deceased person.*—Under a bill to foreclose a mortgage, the mortgagee can not testify as to any transactions between himself and the deceased mortgagor. *Jenkins v. Lovelace*, 303.
22. *Same.*—When a homestead exemption is claimed by the widow and infant children of the deceased defendant in execution, and their claim is contested by the plaintiff, a surety who is bound for the debt on which the judgment is founded, though not a party to the contest, is incompetent to testify to any transactions between the plaintiff and the deceased defendant. *Keel v. Larkin*, 493.
23. *Same.*—Under a bill to enforce an alleged lien on land, filed by the personal representative of the deceased vendor, the defendant is incompetent to testify in his own behalf, as to any transactions between himself and the decedent, unless called to testify by the complainant. *Binford's Adm'r v. Dement*, 491.
24. *Dying declarations.*—When dying declarations are proved to have been made under a sense of impending death, their admissibility or effect as evidence is not impaired or affected by the fact that the family of the deceased thought at the time that he would recover; and proof of that fact is not relevant or admissible as evidence. *Sylvester v. The State*, 201.
25. *Relevancy of suspicious circumstances, implying admission or consciousness of guilt.*—In a prosecution for bastardy, the defendant denying that he had sexual intercourse with the prosecutrix at the time alleged by her, but admitting that he then had opportunities for such intercourse, and that he had intercourse with her at a subsequent time; the fact that, during the woman's pregnancy, which was well known in the neighborhood, he made inquiries and offers to pay for the means of making a woman miscarry, is relevant and competent evidence against him, though he professed to make such inquiries for another person. *Nicholson v. The State*, 176.

BURDEN, WEIGHT, AND SUFFICIENCY.

26. *Burden of proof as to defense against railroad bonds.*—When a holder of railroad bonds, indorsed by the State, seeks to enforce the State's liability as indorser, the original misappropriation of the bonds being shown, the law casts on him the burden of proving that he acquired them in good faith, for value, and in the usual course of business. *Gilman, Sons & Co. v. Railroad Co.*, 566.
27. *Same; proof of notice.*—In such case, the presumption is of a want of notice, since it is not probable, though possible, that notice of the original fraud or illegality would be communicated to a subsequent holder, thereby defeating the transfer; and the burden of proving notice resting on the party who assails the title of the holder, it is not enough to show only that he acquired the bonds under circumstances which would have excited, in the mind of a prudent man, suspicions as to the title of his assignor. *Ib.* 566.
28. *Burden of proof as to consideration of conveyance assailed for fraud.*—When a creditor assails the validity of a conveyance by his debtor, or a conveyance whose consideration proceeded from his debtor, and his debt or demand is older than the date of the conveyance, the *onus* of proving a valuable consideration is cast on the grantee; and if the consideration is averred to be a debt of the grantor or debtor, he must prove the existence and validity of such debt. *Buchanan v. Buchanan*, 55.

EVIDENCE—*Continued.*

29. *Same.*—When a creditor attacks a conveyance on the ground of fraud, but does not deny or impeach the consideration as recited, he must aver and prove that the grantee had notice of the alleged fraudulent intent of the grantor, or participated in it; but, if he denies the consideration as recited, and alleges that the conveyance was in fact voluntary, the *onus* is on the grantee, as against antecedent creditors, to prove a valuable consideration sufficient to uphold it; and when the parties are near relatives, and the conveyance was executed while a suit was pending to subject the lands to the payment of the complainant's debt, the grantee must make it plainly appear, to the satisfaction of the court, that it was a real contract of sale, upon a real and sufficient consideration. *Lipscomb v. Mettellan*, 152.
30. *Burden of proof as to fraud or misrepresentation.*—On a sale of machinery by a manufacturer, the contract being reduced to writing, and the machinery delivered corresponding with the description therein contained, parol evidence is not admissible, in the absence of fraud or misrepresentation, to vary the terms of the writing, and the burden of proving fraud or misrepresentation is on the purchaser. *Whitehead v. Lane & Bodley Company*, 39.
31. *Burden of proof as to navigable river.*—When a party claims that a stream above tide-water, which was not treated as navigable by the United States surveyors, is in fact public and navigable, the *onus* of proof rests on him; and he must also state facts from which the court can draw the conclusion that the stream is navigable. *Walker v. Allen*, 456.
32. *Proof of collateral fact.*—When a fact arises collaterally, the rules of evidence do not require as strict proof of its verity, as when it is directly in issue. *Life Association v. Nerille*, 517.
33. *Proof of insolvency of decedent's estate.*—When notes and other presumptive evidences of debt are duly filed against a decedent's estate, exceeding in amount the available assets, the estate is, *prima facie*, insolvent; and proof of these facts sufficiently establishes the insolvency of the estate, when the question arises collaterally, although some of the claims may be litigated. *Ib.* 517.
34. *Sufficiency and weight of proof.*—The general principle is recognized, that when the evidence leaves a disputed fact in doubt and uncertainty, the issue must be found against the party on whom rests the burden of proof; yet courts and juries should rather weigh the testimony than count the witnesses, and should not render a decision on a mere preponderance which fails to produce a proper conviction in their minds. *Ib.* 517.
35. *Sufficiency of circumstantial evidence.*—The test of the sufficiency of circumstantial evidence, in a criminal case, is not whether it produces as full conviction as would be produced by the positive testimony of a single credible witness, but whether it satisfies the minds of the jury to the exclusion of every reasonable doubt. *Banks & Wood v. The State*, 522.
36. *Sufficiency of evidence, and charge as to conflict.*—If the jury entertain a reasonable doubt as to the truth or falsity of any material fact constituting a part of the testimony in a criminal case, the defendant is entitled to the benefit of that doubt, however small may be its influence; but this principle does not extend to a conflict in the testimony of two witnesses as to a collateral and immaterial matter. *White v. The State*, 195.

MATTERS JUDICIALLY KNOWN.

37. *Municipal charter.*—The charter of a municipal corporation is a public statute, of which courts will take judicial notice. *City Council of Montgomery v. Wright*, 411.

EVIDENCE—*Continued.*

38. *Navigable rivers.*—The court judicially knows that there are no tidal streams in Jackson county; and Paint-Rock river is, *prima facie*, not a public, navigable stream. *Walker v. Allen*, 456.

OBJECTIONS.

39. *Waiver of objections to illegal evidence.*—"Parties may try their controversies on illegal evidence, if they choose to do so;" and if they do not object to illegal evidence when offered, the court may properly consider it. *Moon's Adm'r v. Crowder*, 79.
40. *Objection to question or answer.*—The allowance of an improper question to a witness, against objection, is not an error which will work a reversal, when the record does not show that illegal evidence was thereby elicited and admitted. *Callan v. McDaniel*, 96.
41. *General objection to evidence partly admissible.*—A general objection to evidence, as "incompetent and irrelevant," may be overruled, if any part of the evidence is admissible, although a part is objectionable as secondary evidence. *Hayes v. Wood*, 93.
42. *Objections to evidence; when and how made.*—When interrogatories propounded to a party, as a witness in his own behalf, call for illegal evidence, objection should be taken before filing cross-interrogatories; but this rule does not prevail, when the illegality of the evidence is unknown, or is only disclosed by the answers. *Binford's Adm'r v. Dement*, 491.
43. *Same.*—Objecting to interrogatories which call for illegal evidence, without more, is not sufficient to bring before the chancellor the question of the admissibility of the evidence: there must be, also, written exceptions signed by counsel, specifying the portions of the testimony sought to be suppressed. *Ib.* 491.
44. *Same.*—Motions to suppress testimony, founded on exceptions duly filed, are properly heard before entering on the trial; or, by consent, they may be heard and determined in connection with the main cause; but, when the parties proceed to a hearing by agreement, stipulating that the chancellor may disallow all illegal evidence, this "rather loose practice has a tendency to cast on the chancellor so much unnecessary labor, that he may very justly refuse to act on such agreement." *Ib.* 491.
45. *Same.*—Objections to evidence can not be raised for the first time in this court, but are waived when not properly taken before the chancellor. *Ib.* 491.

OPINION; EXPERTS.

46. *Proof of handwriting.*—A person who has seen another write, or who knows his handwriting, may express his opinion as to the genuineness of a disputed signature, though he be not an expert; and experts may go further—may institute comparisons between the disputed writing and those admitted to be genuine, and give their opinion whether a particular writing or signature is genuine or forged. *Moon's Adm'r v. Crowder*, 79.
47. *To what witness may testify.*—A witness may testify, as a fact, that he "knew and recognized the walk" of another person. *Beale v. Posey*, 323.
48. *Same.*—On a trial under an indictment for infanticide, a witness who examined the dead body of the child may, though not an expert, testify that he "considered it fully developed;" this being a matter of fact open to observation, and the witness being subject to cross-examination as to his use of the words and his knowledge of their meaning. *Hubbard v. The State*, 164.

EVIDENCE—Continued.

PAROL AND WRITTEN EVIDENCE.

49. *As to consideration of deed.*—Parol evidence is not admissible, at law, to contradict the recitals of a deed as to the payment of a valuable consideration. *Berry, Demorville & Co. v. Sowell*, 14.
50. *Same.*—The consideration clause of a deed is always open to unlimited explanation, except for two purposes: 1st, a party to the deed is not permitted to prove a consideration different from that expressed, if thereby the legal effect of the deed is varied; 2d, when payment of the consideration is recited in the deed, the grantor is not allowed, by disproving that recital, to establish a resulting trust in himself. *M. & M. Railway Co. v. Wilkinson*, 286.
51. *Same.*—The owner of land having conveyed a lot to a railroad company, reciting in the deed, as its consideration, "one dollar" in hand paid, "and the benefits which will arise to the grantor from the ownership by the grantee of the property hereby conveyed," the deed does not estop him from showing, as an additional consideration, that the grantee verbally agreed to grade a part of an adjacent lot belonging to the grantor, and to remove and rebuild that portion of his warehouse which was situated on the lot conveyed by the deed, and maintaining an action at law for the breach of such verbal agreement. *Ib.* 286.
52. *Parol evidence varying or explaining deed.*—As between vendor and purchaser, in the absence of fraud or mistake, the deed executed and accepted must be regarded as the sole memorial and expositor of the terms of the contract between them, and parol evidence can not be received to vary, contradict, or explain it. *Rogers v. Peebles*, 529.
53. *Parol evidence removing ambiguity, and identifying land sold.*—As to the sufficiency of parol evidence adduced in this case, showing the particular tract of land of which the purchaser was placed in possession, and thereby removing the uncertainty and ambiguity of description contained in the written contract, the court expresses no opinion, but cites the following cases: *Chambers v. Ringstaff*, 69 Ala. 140; *Ellis v. Burden*, 1 Ala. 458; *Mead v. Parker*, 115 Mass. 413; *Holmes v. Evans*, 48 Miss. 247. *Thompson v. Gordon*, 455.
54. *Parol trust in lands.*—Oral evidence, to overturn a writing in any case, must be clear and convincing; and can not be received (Code, § 2199) to engraft an express trust on a conveyance of lands which is absolute in its terms. *Kelly v. Karsner*, 106.
55. *Same.*—A trust in lands, created verbally, can not be established in equity, unless it is plain and unambiguous in its terms, and proved by clear and convincing evidence; and a trust in personal property, created verbally, and dependent entirely upon oral testimony, can only be established by clear and explicit evidence. *Bailey v. Irwin*, 505.
56. *Parol evidence explaining promissory note.*—A promissory note ought, regularly, to express on its face the time at which it is payable; and if no time is expressed, or plainly manifested, and a blank is not left for the insertion of a day of payment at the option of the payee, resort may be had to extrinsic evidence, showing the circumstances under which the note was executed, and the design of parties in executing it, in order to explain an evident omission, and to fix the time at which it was intended to make the note payable. *Boykin v. Bank of Mobile*, 262.
57. *Same.*—A promissory note payable "seventy-five after date," negotiable and payable in bank, and proved to have been made for the accommodation of the payees, who were commission-merchants in Mobile, to aid them in their business, and delivered to them by the maker, construed to be payable seventy-five days after date;

EVIDENCE—Continued.

and parol evidence was held admissible, in aid of the evident omission, showing the character of negotiable paper, as to length of time of maturity, which the banks in the city would accept. *Ib.* 262.

58. *Parol evidence in aid of defective description of lands in tax assessment and deed.*—When lands assessed and sold for unpaid taxes are described in the assessment, and also in the tax-collector's deed, as "two-thirds ($\frac{2}{3}$) of square 39 in Fisher's tract," without any other words of description or identification, the sale is void for uncertainty and indefiniteness; and the ambiguity being patent, it can not be corrected or explained by extrinsic parol evidence. *Dane v. Glennon*, 160.
59. *Sale of machinery; admissibility of parol evidence to affect writing.*—On a sale of machinery by a manufacturer, the contract being reduced to writing, and the machinery delivered corresponding with the description therein contained, parol evidence is not admissible, in the absence of fraud or misrepresentation, to vary the terms of the writing. *Whitehead v. Lane & Bodley Company*, 39.

PRESUMPTIONS.

60. *Possession as evidence of title.*—A plaintiff in ejectment may recover upon proof of possession merely, as against an intruder or trespasser, or one who does not show a better right; but possession is presumed, in the absence of all evidence to the contrary, to be rightful, and in subordination to the true title; and the burden of proving it to be adverse, as against the owner of the legal title, is on the party asserting it. *Dothard v. Denson*, 541.
61. *Same.*—The open, notorious, and exclusive possession of land by a purchaser claiming it as his own, whether in trust or otherwise, is constructive notice to all the world of his title, whether it be legal or equitable. *Sargers v. Baker*, 49.
62. *Same.*—The possession of personal property is *prima facie* evidence of title, or ownership; and this principle applies to personal property belonging to the wife, whether the possession be in her, or in her husband as her trustee, or in both jointly in recognition of her right. *Patterson v. Kicker*, 406.
63. *Presumption as to character of wife's estate.*—As a rule of evidence, personal property in the possession of the wife, or in the possession of her husband as trustee for her, or in their joint possession, will be presumed to be held as part of her statutory estate, under the laws which have now been of force for more than thirty years, unless affirmatively shown to be an equitable estate. *Ib.* 406.
64. *Presumption as to common law.*—In the absence of proof to the contrary, our courts will presume that the common law prevails in Pennsylvania, Illinois, or any other State having a common origin with our own. *Irwin v. Bailey*, 467.
65. *Presumption from lapse of time.*—After the lapse of twenty years from a sale by an executor and trustee, during which period the purchaser held open, notorious, and uninterrupted adverse possession of the land, although the title of the remainder-men might not be barred, if the power was not legally executed; yet a presumption would arise in favor of the regularity of the sale, and the court would incline to draw inferences favorable to its validity. *Matthews v. McDade*, 378.
66. *As to presumption implied from failure to call witness.*—There is no rule of law which requires that, in cases of larceny or burglary, based on circumstantial evidence, the person who last had the rightful or innocent possession of the stolen property must be examined as a witness for the prosecution, or raises a presumption

EVIDENCE—*Continued.*

favorable to the defendant's innocence from the failure to examine such person as a witness. *White v. State*, 195.

67. *Use of deadly weapon; presumption of malice.*—From the use of a deadly weapon, the law infers an intent to kill, or to do grievous bodily harm; and if the circumstances do not show excuse, justification, or immediate provocation, the presumption of malice is conclusively drawn. *Sylvester v. The State*, 201.

PRIMARY AND SECONDARY.

68. *Proof of title to personalty by writing.*—Although a recovery of personal property may be had on proof of possession, in the absence of countervailing evidence; yet, if the plaintiff undertakes to prove title by a written instrument, he must produce it, or satisfactorily account for its non-production; and if the instrument is produced, and has attesting witnesses, its execution can not be proved by a third person. *Patterson v. Kicker*, 406.
69. *Constable's bond; secondary proof of.*—There is no statute requiring or authorizing the recording of a constable's bond, although it is required to be "approved by the judge of probate, and kept in his office" (Code, § 764); and without such statutory authority, the mere recording of it does not make the record competent evidence as a copy; to make such record admissible evidence, it must be proved to a correct copy, after a proper predicate has been laid for the introduction of secondary evidence. *Martin v. Hall*, 587.
70. *Sale of decedent's lands, under probate decree.*—When a purchaser of lands, at a sale made by an administrator, files a bill in equity, in the nature of a bill for specific performance, to compel a conveyance of the legal title by the heirs, and the averments of the bill are denied, the *onus* of proving the facts necessary to support the order and sale is on the complainant; and these facts are properly proved by a transcript from the record of the Probate Court, if in existence; and if the record has been lost or destroyed, it must be proved as other disputed facts are proved. *Gilchrist v. Shackelford*, 7.

RECORDS.

71. *Erasure or alteration in record offered in evidence.*—When a record, or other written instrument offered in evidence, presents the appearance of an erasure or alteration, and there is ground of suspicion as to it, whether shown by inspection or by extrinsic evidence, the party offering it is required first to remove the suspicion by explaining the erasure or alteration; but, where the erasure or alteration bears no such ear-mark of fraudulent intent—as in this case, where the date of a will admitted to probate appears to have been changed from 1875 to 1873, and the record elsewhere shows that the testator died prior to 1875—the better doctrine is, that the change or correction will be presumed to have been made at the time the instrument was executed. *Martin v. King*, 554.

VARIANCE.

72. *In prosecution for embezzlement.*—Where the indictment alleges that the defendant embezzled property which came to his possession as the agent of S., while the proof shows that the property was placed in his possession by one T., who was the bailee of S., to be delivered to S., the variance is fatal, unless it is shown that S. ratified or recognized the appointment. *Washington v. The State*, 372.
73. *Misnomer and variance.*—The mere mis-spelling of a name, whether of the defendant or a third person, does not vitiate an indictment,

EVIDENCE—*Continued.*

and is not a fatal variance, unless the difference causes a material change in the pronunciation of the name. *Underwood v. The State*, 220.

74. *In chancery*.—Evidence alone, without corresponding allegations in the bill, does not entitle the complainant to any relief. *Jenkins v. Lovelace*, 303; *Gilchrist v. Shackelford*, 7.

EXECUTION.

1. *Lien; how affected by delay or suspension*.—As against the defendant in execution, his heirs, or personal representatives, the lien of an execution is not lost or suspended by the plaintiff's direction to the sheriff to hold it up, since they can not be thereby prejudiced. *Kiel v. Larkin*, 494.
2. *Sale of lands after defendant's death*.—When an execution is received by the sheriff during the life of the defendant, and its lien is preserved as authorized by the statute (Code, §§ 3213, 2633), lands may be sold under a levy made after his death, as if he were still alive. *Ib.* 494.
3. *Sale of mortgaged lands under execution*.—When mortgaged lands are sold under execution against the mortgagor (Code, § 3209), the purchaser acquires the entire interest of the mortgagor, except his statutory right of redemption; and if this right is not exercised within the two years allowed by law, and the mortgagee then obtains a conveyance from the purchaser, the entire title, legal and equitable, is united and vested in him. *Jenkins v. Lovelace*, 303.

EXECUTORS AND ADMINISTRATORS.

1. *Keeping estate together under will; whether personal trusts or executorial duties are conferred*.—Testamentary provisions authorizing and directing an executor to keep the estate together for the term of ten years, cultivating the lands with the labor of slaves, and, at the expiration of that term, to sell all the property not specifically bequeathed, and divide the proceeds of sale among the several legatees, construed in the light of the statutory provisions which, in 1863-4, authorized the Probate Court to confer similar powers on executors, do not impose personal trusts upon the executor, but duties and powers strictly executorial, which he could not exercise without the grant of letters testamentary, and which might be exercised by an administrator with the will annexed. *Foxworth v. White*, 224.
2. *Purchase by executor at his own sale, or from his vendee; when set aside*.—A purchase of lands by an executor at his own sale, whether directly in his own name, or indirectly through the agency of a third person, and whether made under an order of court or a power in the will, will be set aside in equity, at the mere election of the parties in interest, if seasonably expressed; but, having made a fair sale to a third person, he may afterwards purchase from his own vendee, and thereby acquire a good title, though the transaction will be jealously scrutinized by a court of equity. *Ib.* 224.
3. *Contracts of executor in carrying on business for estate*.—When an executor continues to carry on, under powers conferred by the will, the business in which his testator was engaged, he is personally liable on his contracts, and persons who deal with him can not charge the estate with his debts; but the estate is bound to indemnify him on account of debts properly incurred in carrying on the business; and, when he is not in default to the estate, the creditors may be subrogated to his right of indemnity; and when

EXECUTORS AND ADMINISTRATORS—*Continued.*

- this is effected by a private arrangement between the parties, a court of equity will sanction and uphold the transaction. *Ib.* 224.
4. *Sale of lands by administrator.*—An administrator's power to sell the lands of his intestate is purely statutory; and unless he files a petition, containing the necessary averments to give the Probate Court jurisdiction to order a sale, that court can make no valid order of sale, save when the parties in interest are all adults and of sound mind. A sale made without a valid order, based upon a proper petition filed, and upon depositions taken as in chancery cases, is absolutely void, and confers no title; but, if the parties are all adults, and of sound mind, it is not necessary, in a collateral attack, that the record shall show that the proof was taken by deposition. *Gilchrist v. Shackelford*, 7.
 5. *Suits by foreign executors or administrators.*—Under the statutes which were of force in 1867 (Rev. Code, §§ 2293-4), a foreign executor or administrator on the estate of a person who, at the time of his death, was not an inhabitant of this State, but had property here, was not authorized to maintain a suit here, if letters testamentary or of administration had been granted here; and under the law as since amended (Code, §§ 2637-38), while he is authorized to maintain suits and recover property here, on compliance with prescribed conditions, notwithstanding the prior appointment of a domestic administrator, the statute expressly declares that, "before a judgment is rendered in his favor, he shall prove to the court that he has complied in all respects with these conditions, and, failing to do so, can not recover." *Harris v. Moore*, 507.
 6. *Same.*—In a suit brought by such foreign executor or administrator without a compliance with these statutory conditions, his bill being dismissed by the chancellor on other grounds, although his right to maintain the suit was denied by special plea; this court is bound to affirm the decree, although the statute of limitations has since barred a recovery by the domestic administrator. *Ib.* 507.
 7. *Sale under power in mortgage, by foreign administrator.*—A foreign administrator, who has not given bond and had his letters recorded here as required by statute (Code, §§ 2637-40), has no authority to execute a power of sale contained in a mortgage given to his intestate, as a domestic administrator may (*Ib.* § 2198); and a sale by him, under the power, neither cuts off the right of redemption, nor affects the right of a junior mortgagee to be let in to redeem. *Sloan v. Frothingham*, 589.
 8. *Same; ratification by heirs and domestic administrator.*—Though such sale is unauthorized and irregular; yet, if it is ratified by the heirs, next of kin and domestic administrator, and the proceeds of sale are properly applied by the foreign administrator in the due course of administration, the purchaser will be regarded as an equitable assignee of the mortgage and secured debt, and will be subrogated to the rights of the heirs and the domestic administrator. *Ib.* 589.
 9. *Limitation of 'action' against sureties on administration bond.*—Under the statute which prescribes six years as the limitation of "actions against the sureties of executors, administrators or guardians, for any misfeasance or malfeasance whatever of their principal, the time to be computed from the act done or omitted by their principal which fixes the liability of the surety" (Code, § 3226, subd. 7); the word *actions*, being liberally construed, includes a summary execution against the surety, on the return of 'No property found' on an execution issued on a decree against his principal; the statute begins to run from the rendition of the decree against the principal; and when the decree is revived, no execu-

EXECUTORS AND ADMINISTRATORS—*Continued.*

tion having issued on it before revivor, the statute is available to the sureties as a defense against a summary execution on the revived decree, issued more than six years after the rendition of the original decree. *Martin v. Tally*, 24.

10. *Conclusiveness of decree against administrator, as against his sureties.*—A decree rendered against an administrator, on final settlement of his accounts, is equally conclusive on his sureties, in the absence of fraud or collusion, as to the matters of account, but not as to the *factum* of the bond, or other defenses personal to the sureties; and when such decree is revived against the administrator, the revivor is equally conclusive on his sureties, except as to such personal defenses, although they were not parties to such revivor, and had no right to appear and defend against it. *Ib.* 24.
11. *Parties to settlement; presumptions on error.*—On final settlement of an executor's accounts, when the record shows that the decedent left a widow and minor child surviving him, and the decree recites that the infant, "under the construction of the will of the deceased, is not a necessary party to the settlement," but the will itself is not set out, nor its provisions any where shown by the record; this court can not assume, contrary to these recitals, that the decedent died intestate, thereby making the child a necessary party as a distributee, nor that the will, properly construed, made the child a necessary party as a legatee or devisee. *Piney v. Werborn*, 58.
12. *Jurisdiction of Probate Court in matter of trusts; conclusiveness of decree.*—Where the will confers on an executor personal trusts, which may not expire when his executorial duties cease, and which can not be finally settled until, on the termination of the widow's life-estate, the property is delivered to the remaindermen, unless the executor and trustee resigns, dies, or is removed; while the Probate Court may make a final settlement of his accounts as executor, and the decree would be conclusive on the widow, who was a party to it; yet, as to the matters connected with the trust, the court would be without jurisdiction, and the decree rendered would be no protection to the executor in any future litigation with the remaindermen who were not parties to it. *Ib.* 58.
13. *Equitable relief against settlement.*—When a final settlement of an executor's accounts has been made in the Probate Court, no trusts being involved, and no fraud imputed, a court of equity will not re-open the settlement, unless some special cause for its interposition is shown. *Forworth v. White*, 224.
14. *Same; on ground of fraud.*—Where an administrator, on filing his accounts for settlement, wrote to his sister, who was a distributee of the estate, and resided in Texas, informing her that her interest in the estate was a specified sum, about one-fifth of its actual value in fact, and inclosing a receipt for that sum, to be signed by her, which would operate as a release, and which was signed and returned to him, and the money paid; *held*, that this was a fraud, against which a court of equity would grant relief by setting aside the settlement, and that the administrator could not be heard to say that the distributee, in relying on his representations, and failing to appear and contest the settlement, was guilty of negligence or other fault. *Humphreys v. Barleson*, 1.
15. *When distributees may sue, without administration.*—As a general rule, distributees or next of kin can not, in the absence of an administration duly granted, maintain a suit at law or in equity for the mere purpose of administration, nor, in the absence of special circumstances, maintain a suit for the collection of personal assets; and although there are exceptional cases, in which a court of

EXECUTORS AND ADMINISTRATORS—*Continued.*

- equity will decree distribution directly to the next of kin, without the intervention of an administrator, when it is clearly shown that, if one were appointed, his only duty would be distribution; yet such relief will not be granted at the instance of the next of kin of a deceased adult legatee, upon a mere general allegation that there are no outstanding debts against his estate, when such allegation is made upon information and belief merely, and it is not shown that the information was obtained from persons having knowledge of the facts. *Sullivan v. Lawler*, 68.
16. *When distributees or administrator may or must sue.*—When there is an administrator of the estate of a deceased legatee, he is the proper person to sue for the legacy; consequently, the next of kin, or distributees of his estate, can not join in a bill with the surviving legatees, making the administrator a defendant. *Ib.* 68.
 17. *When distributees may maintain suit against administrator and debtors jointly.*—The distributees of a decedent's estate can not maintain a bill in equity against the personal representative and debtors of the estate jointly, without alleging fraud and collusion between them, or a refusal by the personal representative to sue for and collect the debts. *Ib.* 68.
 18. *Suits by administrator or distributees; who may sue.*—The title to the personal effects of a decedent, and the right to maintain personal actions, are devolved by law on the personal representative; and the general rule is, that he alone is authorized to demand, receive, collect, disburse and distribute the personal assets and claims of the estate; and while there are recognized exceptions to this rule, in which administration may be dispensed with, and other cases in which, the personal representative being estopped, or under disability to sue, a court of equity will lend its aid for the discovery and utilization of assets, a bill by distributees must aver the facts necessary to bring the case within one of those exceptions. *Sullivan v. Lawler*, 72.
 19. *When distributees may sue, without administration.*—The general rule is, that distributees, or next of kin, can not maintain a suit for the mere purpose of distribution, until letters of administration have been granted on the estate of the decedent; and this rule must prevail, unless facts are affirmatively shown which bring the particular case within the recognized exception dispensing with an administration when it would be a useless ceremony. *Sullivan v. Lawler*, 74.
 20. *Same.*—Where the testator devised to his widow a life-estate in all his property, and directed "the balance" of the estate at her death "to be sold, and the proceeds to be equally divided among his children," making his widow executrix; administration on his estate, after the death of the widow, is necessary, before the remaindermen can maintain a suit in their own names. *Ib.* 74.

EXEMPTIONS.

1. *Governed by what law.*—As against creditors, the right to a homestead or other exemption, its value and extent, must be determined by the law which was of force when the debt was contracted; and when the creditor is a surety, by the law which was of force when his liability was assumed. *Keel v. Larkin*, 493.
2. *Same; renewal of debt, or change of parties.*—The mere renewal of a debt, or the novation of an old debt by a new one, does not affect the debtor's right of exemption; but, when a new liability is created, by reason of change of parties, or otherwise, and it is taken in full payment and discharge of the original debt, the right

EXEMPTIONS—*Continued.*

- of exemption is measured by the law in force at the date of the new obligation. *Ib.* 493.
3. *Contest of claim of homestead exemption; where originated and tried.*—When an execution, issued on a judgment in the Circuit Court, is received by the sheriff during the life of the defendant, but is not levied until after his death (Code, § 3213), and a homestead is thereupon claimed by the widow; the execution and claim are properly returned into the Circuit Court, where a contest of the claim may be originated and tried; and it is not proper that the contest should be originated in the Probate Court, and certified to the Circuit Court for trial. *Ib.* 493.
 4. *Claim of homestead exemption by widow; proceedings under.*—When a homestead exemption is claimed by the widow, in lands on which an execution, received by the sheriff during the life of the defendant, is levied after his death, the proceedings for its allotment should be governed by section 2832 of the Code, and not by section 2841. *Ib.* 493.
 5. *Homestead exemption; occupancy.*—A claim of homestead exemption can not prevail, without averment and proof of occupancy. *Lyne's Adm'r v. Wann*, 43.
 6. *Waiver of homestead exemption.*—Under the statute approved March 4th, 1876 (Code, § 2848), a waiver of a right of homestead exemption is required to be made "by a separate instrument in writing;" consequently, a waiver embodied in an ordinary promissory note, though attested by one witness, is invalid and inoperative. *Baker v. Keith*, 131.
 7. *Contest of claim of homestead exemption; where tried.*—When a homestead is allotted to the surviving child of a decedent, by commissioners appointed by the Probate Court, and the allotment is contested by a creditor, that court has no authority to try the issue (Code, §§ 2838, 2841), but should certify it to the Circuit Court for trial at the next term. *Ib.* 121.
 8. *Remedy of creditor to enforce waiver.*—As to what is the proper remedy of a creditor, in whose favor a valid waiver of homestead exemption has been executed by a debtor since deceased, the waiver not having been enforced during his life, and his estate being declared insolvent, *quære?* "Possibly legislation is called for on this subject." *Ib.* 121.
 9. *Homestead exemption in favor of decedent's minor child; how affected by insolvency of estate.*—Where a deceased debtor left no surviving widow, but a minor child as the only member of his family, such child had a right to occupy the homestead during minority, and, if the estate was declared insolvent during such minority, the homestead estate vested absolutely in the child, under the provisions of the act approved April 23d, 1873 (Sess. Acts, p. 64, § 15); but, if the child attained its majority before the estate was reported insolvent, the right of homestead terminated with its minority, and was not revived and enlarged into an absolute estate by the subsequent insolvency. *Ib.* 121.
 10. *Claim of homestead exemption, and contest thereof; where tried.*—Under statutory provisions (Code, §§ 2838, 2841), the Probate Court, or the judge of probate, has no jurisdiction to try any contest as to the right of homestead exemption, but is required to certify the issue to the Circuit Court for trial, whether it arise on an allotment made by commissioners, or on an application made to the court under circumstances which dispense with the necessity for the appointment of commissioners. *Farley v. Riordon*, 128.
 11. *Exceptions to widow's claim; when filed.*—A contest of the widow's claim to a homestead exemption can only be originated, in the Probate Court, by the filing of written exceptions to the allowance of

EXEMPTIONS—*Continued.*

- the claim, or of the allotment, as the case may be; which must be filed, when made to the allotment, within "thirty days after the expiration of the sixty days" allowed them for making their allotment and report; and within thirty days, when the claim is made by petition under circumstances which render the appointment and report of commissioners unnecessary, all the facts being presented by the pleadings. *Ib.* 128.
12. *Same.*—If exceptions are not filed within the prescribed time, the court has no power to allow them to be filed afterwards; and an order of continuance, though made by consent, and stated in a subsequent entry to have been made "without prejudice," does not enlarge the time within which exceptions may be filed. *Ib.* 128.
 13. *Alienation of homestead; signature and acknowledgment by wife.* Under the provisions of the constitution of 1868, prior to the passage of the act approved April 23, 1873, a mortgage, or other alienation of the homestead, acknowledged by husband and wife, and certified in the form prescribed by the statute for ordinary conveyances, was sufficient to convey the homestead. *Butts v. Broughton*, 294.
 14. *Claim of exempt personal property; how contested.*—When a declaration and claim of exemption in and to specific articles of personal property has been filed in the office of the judge of probate of the county, a levy can not lawfully be made upon the property (Code, § 2830), unless the plaintiff in the process first makes affidavit and gives bond as prescribed by the statute; and if a levy is made without the performance of these conditions precedent, it will be set aside on motion. *Totten & Bro. v. Sale & Co.*, 488.
 15. *Same.*—If a bond is not given before or at the time of the levy, it can not be subsequently supplied on the hearing of a motion to set aside the levy; and a bond of indemnity, given to the sheriff for his own protection in making the levy, is not a compliance with the statute. *Ib.* 488.

FRAUD.

1. *Equitable relief against fraud.*—Fraud vitiates any and every transaction into which it enters, even the most solemn contracts, and the judgments or decrees of courts of the highest jurisdiction; and when a fiduciary relation exists between two persons, which renders it the duty of one to communicate to the other full information of all facts within his knowledge, the failure to do so is a fraud, against which a court of equity will grant relief. *Humphreys v. Burleson*, 1.
2. *Allegations of misrepresentations not showing fraud.*—In a bill filed by a stockholder in an incorporated building and loan association, asking an account and redemption under a mortgage which he had executed to the association, averments in these words, "Your orator's purpose in obtaining said shares of stock in the outset was to enable him to borrow the money, and not as an investment in the stock, and this purpose was well known to the officers of the company; and orator was moved to borrow the money, and pay this \$75 per month, by the statements and calculations made by said officers, and given to him, that this stock would be worth \$200 per share after the one-hundredth installment was paid in, and he became a shareholder by the purchase of stock for the above purpose, and under the foregoing representations,"—show only the expression of an opinion or judgment on a matter which was equally open to both parties, and do not amount to a charge of fraud or willful misrepresentation. *Lake v. Security Loan Association*, 207.

FRAUDS, STATUTE OF.

1. *Agreement by mortgagee to redeem from purchaser, for mortgagor.*—An agreement or promise by the mortgagee to redeem the lands from a purchaser at execution sale, for the benefit of the mortgagor, and to allow him to redeem on repayment of the amount advanced, with interest, and the balance due on the mortgage debt, is within the statute of frauds (Code, § 2121), and can not be enforced unless a compliance with the requisitions of the statute is shown; and the re-payment of the money does not take the case out of the statute, unless possession was also taken and held under the contract. *Junkins v. Lovelace*, 303.
2. *Pleading statute.*—The statute of frauds, as a defense in equity to a bill which seeks the specific performance of a contract relating to lands, must be pleaded, unless the bill shows on its face that the contract is obnoxious to the provisions of the statute. *Bailey v. Irwin*, 505.

FRAUDULENT CONVEYANCES.

1. *Surety's rights, as against fraudulent and voluntary conveyances.*—A surety is a creditor, within the meaning of the statute of frauds (Code, § 2124), and entitled to protection against fraudulent and voluntary conveyances, from the time when his contingent liability was assumed, although he has no technical right of action until he has paid the debt. *Keel v. Larkin*, 493.
2. *Validity of conveyance assailed for fraud; burden of proof as to consideration.*—When a creditor attacks a conveyance on the ground of fraud, but does not deny or impeach the consideration as recited, he must aver and prove that the grantee had notice of the alleged fraudulent intent of the grantor, or participated in it; but, if he denies the consideration as recited, and alleges that the conveyance was in fact voluntary, the *onus* is on the grantee, as against antecedent creditors, to prove a valuable consideration sufficient to uphold it; and when the parties are near relatives, and the conveyance was executed while a suit was pending to subject the lands to the payment of the complainant's debt, the grantee must make it plainly appear, to the satisfaction of the court, that it was a real contract of sale, upon a real and sufficient consideration. *Lipscomb v. McClellan*, 151.
3. *Same.*—When a creditor assails the validity of a conveyance by his debtor, or a conveyance whose consideration proceeded from his debtor, and his debt or demand is older than the date of the conveyance, the *onus* of proving a valuable consideration is cast on the grantee; and if the consideration is averred to be a debt of the grantor or debtor, he must prove the existence and validity of such debt. *Buchanan v. Buchanan*, 55.
4. *Conveyance to creditor; when fraudulent as to others.*—A conveyance or sale by an insolvent debtor to one of his creditors, in payment of an existing debt, will not be held fraudulent as against other creditors, because of an actual fraudulent intent on his part, unless the creditor had knowledge of that intent, or participated in the fraud. *Lyne's Adm'r v. Wann*, 43.
5. *Same; when allowed to stand as valid security.*—When a conveyance is assailed by creditors on the ground of fraud, and the grantee is not implicated in the fraudulent intent of the grantor, the conveyance will be allowed to stand as a valid security to the extent of the actual consideration proved to have been paid. *Ib.* 43.
6. *Voluntary conveyance; parol evidence as to consideration.*—A voluntary conveyance is void as to the existing creditors of the grantor, and parol evidence is not admissible, at law, to contradict its re-

FRAUDULENT CONVEYANCES—Continued.

citals as to the consideration. Hence, the grantee, claiming that the deed was founded in fact on valuable consideration, would be without legal remedy against an attaching creditor of the grantor, and the levy of the attachment would be no obstacle to a reformation of the deed in equity. *Berry, Demanville & Co. v. Sowell, 14.*

7. *Trust in fraud of creditors.*—When lands are conveyed by a debtor to his wife or child, with the intent to place the property beyond the reach of his creditors, and to be held in secret trust for his own benefit, neither he nor his heirs can enforce the trust. *Kelly v. Karsner, 106.*

GAMING. See **CRIMINAL LAW**, 11, 12.

GARNISHMENT. See **ATTACHMENT**.

GUARDIAN AND WARD.

1. *Non-residence of guardian.*—The fact that a guardian is a non-resident when a decree is rendered in his favor, for the use of his ward, does not justify the inference that he was also a non-resident at the time of his appointment, but the court will presume, if necessary, that he changed his residence after his appointment; and even if he was a non-resident when appointed, the appointment would not be void, but only irregular and voidable. *Martin v. Tally, 23.*
2. *Conclusiveness of decree.*—In a proceeding to enforce a decree rendered in favor of a guardian for the use of his ward, by summary execution against the sureties on the defendant's bond as administrator, the recitals of the decree are conclusive as to the fact of the guardian's appointment and its regularity, and they can not be impeached or questioned. *Ib. 23.*

HABEAS CORPUS.

1. *Who entitled to.*—A person who is in the county jail, under a *mitimus* issued by a justice of the peace, before whom he was brought on a charge of vagrancy, and, demanding a trial by jury, was required to give bond for his appearance at the next term of the Circuit Court, and committed to jail on failing to give such bond, is not entitled to the writ of *habeas corpus*. *Ex parte Franklin, 242.*

HOMESTEAD. See **EXEMPTIONS**.

HUSBAND AND WIFE.

1. *Removal of disabilities of coverture by decree of chancellor; extent of powers conferred by decree.*—Under the provisions of the statute approved February 10th, 1875 (Code, § 2731), chancellors are authorized, either in term time or vacation, on the filing of a proper petition and regular proceedings had under it, "to relieve married women of the disabilities of coverture, as to their statutory and other separate estates, so far as to invest them with the right to buy, sell, hold, convey and mortgage real and personal property, and to sue and be sued as *femmes sole*;" but a decree rendered under this statute removes the disabilities of coverture only to the extent particularly specified in the statute, and does not confer on the petitioner the power to make general contracts. *Cohen v. Wollner, Hirschberg & Co., 233.*
2. *Same; averments of petition.*—When a petition is filed under this statute, it must allege that the petitioner has a separate estate, statutory or equitable; and the omission of such averment, it being a jurisdictional fact, renders the entire proceeding void. *Ib. 233.*

HUSBAND AND WIFE—*Continued.*

3. *Conveyance of wife's property.*—Property belonging to the statutory estate of a married woman, whether real or personal, can only be disposed of in the particular mode prescribed by the statute; that is, by the joint conveyance in writing of herself and her husband, attested or acknowledged as prescribed. *Pollak & Co. v. Graves*, 347.
4. *Same; sale or exchange of horse.*—If the husband purchases a horse with money belonging to the wife's statutory estate, not taking the title to himself, the legal title vests in the wife; and a subsequent exchange of the horse for another, not consummated by writing signed by husband and wife jointly (and attested or acknowledged), though made with the assent of the wife, does not divest her title to the first horse, nor vest in her any title to the second. *Ib.* 347.
5. *Purchase by husband, for wife; title not passing to her.*—If the husband buys personal property at the request of the wife, but pays the price with money borrowed by him on his own credit, the title vests in him, not in his wife; and the subsequent re-payment of the borrowed money, with money belonging to the wife's statutory estate, does not change the title, nor create in the wife any interest in the property which she can assert at law as against his creditors. *Ib.* 347.
6. *Presumption as to character of wife's estate.*—As a rule of evidence, personal property in the possession of the wife, or in the possession of her husband as trustee for her, or in their joint possession, will be presumed to be held as part of her statutory estate, under the laws which have now been of force for more than thirty years, unless affirmatively shown to be an equitable estate. *Patterson v. Kicker*, 406.
7. *Use of wife's funds by husband; whether conversion or investment.* When the husband purchases property at an administrator's sale, and is allowed a credit on his purchase to the extent of his wife's distributive share of the estate, this is not an investment for the wife, but a conversion of her interest, and renders him her debtor for the amount. *Lyne's Adm'r v. Wain*, 43.
8. *Same; as consideration of conveyance to wife.*—If the husband receives moneys belonging to his wife's statutory estate, and converts them to his own use, thereby becoming a debtor to her to that amount, this constitutes a valuable consideration to support a subsequent conveyance to her; but he is not liable for interest on such moneys, nor for property belonging to her which he received, but which he is not shown to have sold and converted to his own use; and as to these items, the conveyance would be without a valuable consideration. *Ib.* 43.
9. *Husband's agreement, not binding wife or her property.*—The lands of the wife having been sold and conveyed by the joint deed of husband and wife, not containing any covenant or warranty as to quantity, a writing signed by the husband alone, more than a year afterwards, not founded on any new consideration, and agreeing to a re-survey of the lands with a view to the correction of any mistake as to quantity, can not impose any liability on the wife, or prejudice her rights in any way. *Rogers v. Peebles*, 529.
10. *Husband's assent to embankment causing damage to wife's lands.* The assent of the husband to the construction or continuance of an embankment on the adjacent lands, causing continuous injury to his wife's land, can not bar or preclude her from maintaining a suit in equity to enjoin and abate it. *Nininger v. Norwood*, 277.
11. *Wife's equitable estate; how affected by change of domicile.*—When the wife is possessed of an equitable separate estate in property which accrued to her elsewhere, the character of this estate is not changed by the removal of herself and husband to this State, bringing the

HUSBAND AND WIFE—*Continued.*

- property with them, and the acquisition of a domicile here; and on her subsequent death intestate, the title and ownership of the property devolve upon her personal representative or heirs at law, to the exclusion of the husband. *Irwin v. Bailey*, 467.
12. *Renunciation of marital rights by husband.*—At common law, the husband might renounce his marital rights in and to his wife's property; and the effect of such renunciation was, that the property became the equitable estate of the wife, as if he had first reduced it to possession, and then made a gift of it to her. *Ib.* 467.
 13. *Removal of husband as wife's trustee.*—Where the husband has precluded himself from asserting his rights as trustee for his wife, and has abandoned her, taking up his permanent residence in a foreign country, a court of equity will remove him, at the instance of the wife, seeking to enforce her rights, and appoint another trustee for her. *Sloan v. Frothingham*, 589.
 14. *Annuity to husband and wife during their joint lives, and to survivor for life, payable to husband "for their mutual benefit;" wife's interest in.*—Where an annuity is created by deed, charged on lands, and secured by mortgage, in favor of husband and wife during their joint lives, and to the survivor for life, and is made payable to the husband "for their mutual benefit;" the husband does not take the entire interest during the joint lives of himself and wife, but he and his wife take by moieties; he receives and holds her portion as trustee for her, is liable to account to her for it, and can not make it his own, nor make an assignment or transfer which would affect her rights; and she has such an interest as entitles her to maintain a bill in equity to foreclose the mortgage, and to redeem from an older mortgage on the lands. *Ib.* 589.
 15. *Bill by husband and wife, and dismissal thereof by husband.*—A bill filed in the names of husband and wife jointly, to enforce payment of an annuity charged on lands, and made payable to the husband for the mutual benefit of himself and his wife during their joint lives, is the bill of the husband alone; and a dismissal of the bill by him, on compromise with the defendant, does not prejudice the rights of the wife, nor bar her from maintaining another bill to enforce payment of her part of the annuity. *Ib.* 589.
 16. *Statutory provisions as to parties, in suits by married women.*—The statute which provides that a married woman "must sue or be sued alone, when the suit relates to her separate estate" (Code, § 2892), applies only to actions at law, and has no reference to suits in equity. *Naugers v. Baker*, 49.
 17. *Rules of practice as to parties, in suits by married women.*—The 15th Rule of Chancery Practice, adopted in January, 1877, providing that "all bills and petitions by married women, in reference to their separate estates, shall be exhibited in their own names, if over twenty-one years of age, or relieved of the disabilities of coverture" (Code, p. 163), was intended to carry out the legislative policy indicated by the said act approved March 4th, 1876, since inoperative because omitted from the Code of 1876; and while said rule applies equally to all separate estates, whether statutory or equitable, it extends only to cases in which, prior to its adoption, it was necessary that a married woman should sue by her next friend, and does not apply to cases in which it was necessary or proper that she and her husband should join as co-complainants. *Ib.* 49.
 18. *Joinder of husband and wife as plaintiffs.*—As decided in this case on a former appeal (66 Ala. 292), the wife is a proper and necessary party to a bill filed by the husband, seeking the specific performance of a contract for the sale of a tract of land, when it appears that the purchase-money was paid with funds belonging to

HUSBAND AND WIFE—*Continued.*

the wife's statutory estate, though the title-bond was taken in the name of the husband; and if the evidence establishes the case made by the bill, the title should be vested in the wife by the decree of the court for a specific performance. *Ib.* 49.

INDICTMENT. See CRIMINAL LAW, 13-16.

INFANTS.

1. *Contracts of infants.*—The modern decisions, including our own adjudged cases, have settled these propositions: 1st, that an infant is not liable on any of his contracts, excepting only for necessities,—the just value of which may be recovered, but not the price agreed to paid; 2d, that the appointment of an attorney is the only act which an infant is legally incapacitated to perform; 3d, that all other contracts of an infant, whether executed or executory, are only voidable, and may be either ratified or avoided at his election. *Fletcher & Lichten v. Dickerson*, 318.
2. *Same.*—The plea of infancy is a good defense to an action on a written obligation given for the rent of land, when the action is commenced before the infant has attained his majority, and before the expiration of the term. *Ib.* 318.
3. *Same.*—Such contract, being executory, can only be ratified by "an express confirmation, or new promise, voluntarily and deliberately made by the infant upon his coming of age, and with the knowledge that he is not legally liable." The fact that he retained and sold the crops raised by him is not a ratification or affirmation of the contract. *Ib.* 318.
4. *Contracts of infants; disaffirmance of.*—The void a deed, or other executed agreement, entered into during his minority, an infant is not required to do any act during the continuance of his minority: any voidable executed contract may be disaffirmed by him, if it relates to personal property, either before or after reaching his majority; but he can not conclusively avoid a deed or sale of lands until after he has attained his majority. *McCarthy v. Nierosi*, 332.
5. *Same.*—Such voidable contract may be affirmed, by unequivocally recognizing its continued existence and binding force; and it may be disowned by some distinct and positive act, leaving no room for doubt as to the intention—such as notice, suit, entry, plea, or other act of unmistakable intention. In case of an executed conveyance of real estate, or any interest therein, mere acquiescence will not operate as a ratification, unless continued until the statute of limitations has effected a bar: *a fortiori*, when he has in the meantime parted with the title. *Ib.* 332.
6. *Same.*—If an infant creates by writing a private easement in his land, and afterwards conveys the land by absolute deed to another, and ratifies the deed after attaining his majority, his subsequent ratification of the contract creating the easement is inoperative as against the grantee in the deed. *Ib.* 332.

INJUNCTION. See CHANCERY, 25, 31, 34.

INN-KEEPERS.

1. *Liability at common law.*—At common law, an innkeeper was bound to receive and entertain, for a reasonable reward, all persons who applied to him, not being of disorderly conduct, and having the means of payment; the principles regulating his rights, duties, and liabilities towards his guests, being founded on considerations of public policy, and intended for the security of travellers and stran-

INN-KEEPERS—*Continued.*

- gers, who were necessarily compelled to intrust their property to him. *Beale v. Posey*, 323.
2. *Statutory regulations as to.*—By statutory provisions forming a part of the general revenue law (Code, §§ 522-25), the keepers of inns and hotels are required to take out an annual license, and their liabilities towards their guests are declared to be, "in the absence of a special contract regulating the same, such as are fixed by the laws of the land;" while the keeper of a "house or place for the entertainment of travellers, lodgers, transient persons or guests, in any town, city or village," from whom no license is required, but on whom an income tax is imposed, is allowed a large liberty in the selection of his guests, and is required to make a special contract with them, evidenced by a memorandum printed or written. *Ib.* 323.
 3. *Same.*—If the keeper of such unlicensed house of entertainment fails to make a special contract with his guest, as required by the statute, he can not recover compensation for board and lodging furnished, and assumes the common-law liability of an innkeeper for the loss of goods belonging to his guest; and when sued by a guest for the loss of goods, he can not be heard to say that he was not a licensed innkeeper. *Ib.* 323.
 4. *Same; keeping depository for valuables, and posting notice thereof.* The keeper of an inn or public hotel in a city may relieve himself from liability for the loss of money, jewelry, &c., by providing a safe depository for such articles, and giving notice thereof to his guests (Code, §§ 1549-51); but the posting of notice on a single door in the house, no matter how public it may be, is not a sufficient compliance with the statute, and does not justify the inference of notice to any particular guest. This provision is confined to cities, and has no application to houses in a town or village, or in the country. *Ib.* 323.
 5. *Same; who is guest.*—A traveller, or transient visitor, engaged on temporary business, does not lose the character of a guest in a hotel, merely because he makes a special contract for board and lodging at less than the usual charges. *Ib.* 323.

INSOLVENT ESTATES.

1. *Removal of settlement into equity.*—When a decedent's estate has been declared insolvent, it requires a very clear and strong case to justify the removal of the settlement into a court of equity. *Shackelford v. Bankhead*, 476.
2. *Same.*—The omission from the inventory of property which ought to have been included, the waste or conversion of assets, and the failure to make a settlement, being matters which are within the jurisdiction of the Probate Court, and as to which its powers are fully adequate to grant relief, furnish no ground for a resort to a court of equity by a creditor. *Ib.* 476.
3. *Proof of insolvency.*—When notes and other presumptive evidences of debt are duly filed against a decedent's estate, exceeding in amount the available assets, the estate is, *prima facie*, insolvent; and proof of these facts sufficiently establishes the insolvency of the estate, when the question arises collaterally, although some of the claims may be litigated. *Life Association v. Neville*, 517.

INSURANCE. See ASSIGNMENT, 4.

JUDGMENTS AND DECREES.

1. *Judgment against garnishee; recital of judgment against defendant.* A garnishment on a judgment being consequential and auxiliary

JUDGMENTS AND DECREES—*Continued.*

- only, the final judgment against the garnishee must recite the fact and amount of the judgment against the original defendant. *Whorley v. M. & C. Railroad Co.*, 20.
2. *Amendment of judgment nunc pro tunc.*—At common law, a judgment could not be amended after the expiration of the term at which it was rendered; and while the statutory provisions authorizing the correction of errors or mistakes after the expiration of the term, on record or quasi-record evidence (Code, § 3154), have been liberally construed, they are confined to clerical errors or mistakes, leaving judicial errors to be corrected by appeal. *Ib.* 20.
 3. *Same; what are clerical errors.*—In the entry of a final judgment against a garnishee, it is the duty of the clerk to recite the fact and amount of the original judgment against the defendant; and his failure to do so is a clerical error, which may be corrected *nunc pro tunc* at a subsequent term. *Ib.* 20.
 4. *Conclusiveness of decree.*—In a proceeding to enforce a decree rendered in favor of a guardian for the use of his ward, by summary execution against the sureties on the defendant's bond as administrator, the recitals of the decree are conclusive as to the fact of the guardian's appointment and its regularity, and they can not be impeached or questioned. *Martin v. Tally*, 23.
 5. *Revivor of decree, and conclusiveness of revived decree.*—A void decree can not be revived; consequently, in a proceeding to enforce satisfaction of a decree which has been revived, the validity of the original decree can not be assailed. *Ib.* 23.
 6. *Same; decree against administrator, conclusive against his sureties.* A decree rendered against an administrator, on final settlement of his accounts, is equally conclusive on his sureties, in the absence of fraud or collusion, as to the matters of account, but not as to the *factum* of the bond, or other defenses personal to the sureties; and when such decree is revived against the administrator, the revivor is equally conclusive on his sureties, except as to such personal defenses, although they were not parties to such revivor, and had no right to appear and defend against it. *Ib.* 23.
 7. *Conclusiveness of decree in chancery.*—When the complainant voluntarily dismisses his bill, the decree dismissing it "is very like a voluntary nonsuit at law, which does not bar a second suit;" but where the decree recites that the cause "again came on to be heard, on the papers formerly read, and the answer of the defendant, with the exhibits filed with said answer, and with general replication to said answer, and upon the report of the master commissioner, made in pursuance of the decretal order of the last term, and was argued by counsel;" and then proceeds, "on consideration whereof, and on motion of the plaintiff, the court doth adjudge, order and decree, that the bill of plaintiff be dismissed, and that he pay to the defendant his costs in this behalf expended, but the defendant is not to be barred or precluded by this decree from asserting or recovering, in any proper suit, any balance which may be found due him by the plaintiff, as set out and asserted in the answer of said defendant, growing out of the account asked for in said bill;" this, it seems, is not a voluntary dismissal by plaintiff, but rather only shows that he moved for a decree in the cause. *Moon's Adm'r v. Crowder*, 79.
 8. *Same.*—When a bill in equity is dismissed for want of jurisdiction, or because the complainant has a plain and adequate remedy at law, or because of any mere defect in the pleadings, or, generally, on any other ground not involving the merits, such dismissal is usually stated to be "without prejudice," and is not held to be a final and conclusive adjudication of the matters in litigation: but.

JUDGMENTS AND DECREES—*Continued.*

when a bill is dismissed on the merits, the decree is final and conclusive, like a judgment at law, not only as to all facts or issues actually decided, but as to all points necessarily involved in the matter adjudicated. *Strang v. Moog*, 460.

9. *Same*.—When a bill assails the validity of a mortgage on the ground that the consideration was an illegal agreement to suppress a criminal prosecution, a decree dismissing it on the merits, because the proof failed to sustain the allegations, is conclusive as to that issue; and it can not be again litigated in an action at law founded on the mortgage. *Ib.* 460.
10. *Res adjudicata, at law and in equity*.—In the application of the principle of *res adjudicata*, there is no difference between courts of law and courts of equity; when an issue of fact, or of law, has been adjudicated on the merits in either tribunal, it can not be again litigated in the other. *Ib.* 460.
11. *Entry of judgment or decree by Probate Court: when properly made and dated*.—A decree of the Probate Court, rendered on the final settlement of an estate, usually embraces the findings of the court on both law and fact, and, like a decree in chancery, can not be known until it is officially announced by the judge; and it should bear date and take effect as of the time of said official announcement. But, when the probate of a will is contested, and an issue of *devisee vel non* is submitted to a jury, who find in favor of the will, the judgment necessarily follows the verdict, as in an action at law; and the verdict being rendered on Saturday morning, while the court is in session, the judgment is properly entered and dated as of that day, although the entry was not actually made until ten o'clock at night, after the expiration of office hours. *Lanier v. Richardson*, 134.
12. *Conclusiveness of judgment or decree*.—A judgment and decree rendered in an administration suit in Virginia, where the deceased debtor died, however conclusive against the widow, heirs and devisees, who were parties to the suit, as to the validity and justness of the claims of creditors which were presented and allowed, can not prevent the operation of the Alabama statute of non-claim, when pleaded by them and the personal representative appointed here, in bar of a suit here instituted to enforce satisfaction of the claims out of lands in Alabama. *Jones v. Drewry*, 311.
13. *Conclusiveness of judgment as bar to another suit*.—The rule of *res adjudicata*, or former recovery, is confined to those cases in which the parties are the same, the subject-matter the same, the identical point directly in issue in each, and the judgment in the first suit rendered on that point; and it is essential, also, that the former judgment was rendered on the merits of the case. *McCall v. Jones*, 368.
14. *Same; what is decision on merits; misjoinder and nonjoinder*.—It is not always easy to determine what issues may be considered as involving the merits of the case; but it seems to be generally conceded, that when the suit is defeated on the single ground of a misjoinder of parties plaintiff, the judgment is not a decision on the merits, and is not a bar to another suit. *Ib.* 368.
15. *Same*.—An action by husband and wife as joint plaintiffs, to recover damages for the conversion of property belonging to the wife's equitable estate, which had been reduced to possession, having been defeated on the ground that there was a misjoinder of parties plaintiff, the judgment is not a bar to a subsequent action by the husband alone, suing as trustee; though, it seems, if the first action had proceeded to judgment on the merits, the question of misjoinder not being raised, the judgment would be a bar to the second action. *Ib.* 368.

JUDGMENTS AND DECREES—*Continued.*

16. *Decree for costs.*—While clerical errors may be corrected at a subsequent term, the sentence and judgment of the court—that which has been deliberately ordered and adjudged in the final decree—can not be changed or modified at a subsequent term; and this is as true of that part of the decree which adjudges the costs, as of any other part. *Ex parte Robinson*, 389.
17. *Summary judgment; recitals of record; waiver of irregularities.* When a party resorts to a statutory and summary remedy, in derogation of common-law principles and procedure, the record must affirmatively show every fact necessary to bring the case within the statute, and a strict conformity to its requirements in the mode of procedure; but, if the defendants appear, and, without objection to the mode or form of proceeding, submit the issues to the decision of the court and jury, irregularities in the proceedings are thereby waived; and the court having jurisdiction of the subject-matter, and of the parties by their appearance, such irregularities are not available on error. *Ratliff v. Allgood*, 119.

JURORS AND JURY.

1. *Struck jury in civil cause; challenge for cause.*—When a struck jury is demanded in a civil cause, although the statute provides that, from the list of jurors in attendance upon the court, furnished by the sheriff, "a jury must be obtained by the parties striking alternately one from the list until twelve are stricken off," and that "the jury thus obtained must not be challenged for any cause" (Code, § 3018); yet either party may challenge a juror for cause, on account of bias or interest in the particular case; and the fact that a juror served in that capacity on a former trial of the cause, which resulted in a mistrial, is good ground of challenge for cause. *Dothard v. Denson*, 541.
2. *Waiver of trial by jury; agreement for, on former trial.*—A written agreement in a civil cause, entered into by the parties or their attorneys of record, submitting the cause to the decision of the court without the intervention of a jury (Code, § 3029), being in abrogation of a valuable constitutional right and privilege, will not be construed as binding on another trial at a subsequent term; particularly where a new party, in the meantime, has been introduced by amendment. *Martin v. King*, 354.
3. *Oath of petit jury.*—A recital in the judgment-entry, in a criminal case, that "the jury was sworn according to law to try the issue joined," does not show a substantial compliance with the statute (Code, § 4765), but negatives the idea that the proper oath was administered. *Walker v. The State*, 218.
4. *Separation of jurors, or other misconduct.*—In appellate courts which reverse judgments or orders refusing a new trial, the safer and sounder rule seems to be, that a new trial is not granted as a matter of course, merely because the jurors were not kept under the eye of an officer from the beginning to the end of the trial, but that such irregularity makes out a *prima facie* case for a new trial, and casts on the prosecution the *onus* of showing affirmatively that the jurors were not tampered with; and that being affirmatively shown, a new trial should not be granted. *Butler v. The State*, 179.
5. *Challenge of jurors, in bastardy proceedings.*—The statute does not prescribe the number of peremptory challenges, to which the defendant shall be entitled; and he can not complain that he was allowed only four challenges, as in civil cases, instead of six, as in criminal cases. *Dorgan v. The State*, 173.
6. *Competency of juror.*—A juror is not subject to challenge for cause, merely because he has formed an opinion as to the guilt or inno-

JURORS AND JURY—*Continued.*

- cence of the accused, which may be changed by the evidence; he is disqualified, only "when he has a fixed opinion which would bias his verdict." *Beason v. The State*, 191.
7. *Same; who is householder.*—A man who provides for his family, and lives with them in a house which belongs to his wife's statutory estate, of which he has control as husband and trustee, is a householder (Code, § 4735), and competent to serve as a juror. *Sylvestre v. The State*, 201.
 8. *Special venire in capital case; what is revisable.*—The number of jurors to be summoned in a capital case is matter of discretion with the court, provided the number summoned, including the regular jurors for the week or term, is not less than fifty, nor more than one hundred (Code, § 4874); and the exercise of this discretion is not revisable on error. *Hubbard v. The State*, 164.
 9. *Objection to venire, on account of mistakes in names of jurors.*—Mistakes in the names of persons summoned as jurors in a capital case, or discrepancies in their names between the venire and the copy served on the defendant, are not good ground for quashing the venire. *Ib.* 164.
 10. *Organization of grand jury; voluntary appearance of juror drawn but not summoned; summons of person not drawn.*—A person who was regularly drawn and selected as a grand juror, but was not summoned, may voluntarily appear, and thereby subject himself to the control of the court as if he had been summoned; and if a person is summoned who was not drawn and selected, and who does not appear, such summons does not work any irregularity in the organization of the grand jury. *Sylvestre v. The State*, 201.

JUSTICE OF THE PEACE.

1. *Jurisdiction of bastardy proceeding.*—In a prosecution for bastardy (Code, §§ 4071-80), the justice of the peace, before whom the complaint is made, has no more power to render a final judgment of acquittal, than a judgment of conviction; and if he finds from the evidence adduced that there is not probable cause to believe that the defendant is the father of the child, and therefore discharges him, such discharge can not be pleaded in bar of another prosecution. *Nicholson v. The State*, 176.
2. *Proceedings under warrant of arrest.*—When a person is arrested on a charge of vagrancy, or other offense of which a justice of the peace has jurisdiction (Code, § 4628), and brought before a justice for trial, it is the duty of the justice, unless the defendant demands a trial by jury, "to determine both the law and the facts, and award the punishment which the law may demand" (§ 4697); but, if the defendant demands a trial by jury, the justice has no jurisdiction to try him, but is required to bind him over to appear at the next term of the Circuit (or City) Court, to answer the charge (§ 4695), and, on his failure to give bond as required, to commit him to the county jail until the next term of said court. *Ex parte Dunklin*, 241.
3. *Interrogating accused on preliminary examination.*—The practice of examining or interrogating an accused person, by the magistrate, pending the preliminary investigation, is unwarranted by the principles of the common law, is not authorized by any existing statute, and is contrary to the spirit of the constitutional provision which declares that no person shall be compelled to give evidence against himself; and statements or confessions made by the accused, in response to questions thus propounded by the magistrate, are not competent evidence against him. *Kelly v. The State*, 244.

LANDLORD AND TENANT.

1. *Landlord's relation to sub-tenant.*—At common law, there was no privity of estate or contract between the landlord and the under-tenant of his lessee, nor could he maintain any action against such under-tenant for the recovery of rent. *Robinson v. Lehman, Durr & Co., 401.*
2. *Landlord's statutory lien and remedies against crop.*—By statutory provisions (Rev. Code, §§ 2961–63), since modified in the interest of sub-tenants (Code, § 3476), a lien was given to the landlord, for the rent of the current year, on the entire crops raised on the rented premises, whether raised by the tenant or by a sub-tenant; but this lien was given to the landlord for his own protection, and he can not be compelled to so exercise his statutory right as to protect or benefit another person who may have a lien on the crop of the under-tenant. *Ib. 401.*
3. *Same; discharge of levy on crop of under-tenant.*—The landlord having sued out an attachment to enforce his statutory lien on the crops, and having afterwards released the levy on the crops of under-tenants who had paid their rent to their immediate landlord, he does not thereby forfeit or impair his right to subject other portions of the crop, or to proceed against a third person who, having knowledge or notice of his lien, has received and sold a portion of the crop; and having brought an action on the case against a merchant who, having made advances to the under-tenants, had received and sold some of the crops raised by them, the latter has no right to insist that the demand shall be credited with the value of the crops so released from the levy of the plaintiff's attachment for rent. *Ib. 401.*
4. *Apportionment of rent and statutory lien.*—Under an entire contract for the rent of a plantation and a ferry appurtenant to it, at an aggregate price, the rent and statutory lien can not be apportioned. *Ib. 401.*
5. *Lease construed; stipulation for continued possession of lands cleared and cultivated.*—A stipulation in a written lease for the term of three years, that the lessee shall have the right to occupy for three years such portions of the lands as he may clear and reduce to cultivation each year of the term, runs with the land, and is binding on a purchaser, or assignee of the reversion; and when sued by the purchaser or assignee, on the expiration of his original term, the lessee may show his right to the continued occupation of the portions of land cleared and cultivated under this stipulation. *Callan v. McDaniel, 96.*

LARCENY. See CRIMINAL LAW, 25–30.

LIEN.

1. *Of attorney.*—The lien of an attorney at law, for his stipulated or reasonable fee, is limited to the judgment recovered in the particular case in which his services were rendered; and it does not extend to lands, or other like property of the client, which is the subject-matter of litigation. *McWilliams v. Jenkins, 480.*
2. *Of execution; how affected by delay or suspension.*—As against the defendant in execution, his heirs, or personal representatives, the lien of an execution is not lost or suspended by the plaintiff's direction to the sheriff to hold it up, since they can not be thereby prejudiced. *Keel v. Larkin, 493.*
3. *Equitable lien on common fund, created by agreement.*—Commissioners being appointed by the governor, under authority conferred by a special statute, to locate and procure patents for the State to swamp and overflowed lands donated by act of Congress, their

LIEN—*Continued.*

compensation being twenty per cent. of the amount realized by the State on the subsequent sale of the lands, and their expenses to be paid by themselves; an agreement among them, by which one was to advance moneys deemed necessary in the execution of the common business, to be reimbursed out of the fund provided as compensation when collected, creates a charge or lien on the fund, for the amount so advanced, in the nature of an equitable mortgage; which lien or charge is not capable of enforcement at law, and is peculiarly within the jurisdiction of a court of equity. *Powell v. Jones*, 392.

LIMITATIONS, STATUTE OF.

1. *Rules of construction.*—Statutes of limitation are enacted in the interest of repose, and rest on the presumption that meritorious claims will not be allowed to slumber until human testimony is lost, or human memory fails; and their remedial provisions are never construed strictly. *Martin v. Tally*, 24.
2. *Limitation of 'action' against sureties on administration bond.*—Under the statute which prescribes six years as the limitation of "actions against the sureties of executors, administrators or guardians, for any misfeasance or malfeasance whatever of their principal, the time to be computed from the act done or omitted by their principal which fixes the liability of the surety" (Code, § 3226, subd. 7); the word *actions*, being liberally construed, includes a summary execution against the surety, on the return of 'No property found' on an execution issued on a decree against his principal; the statute begins to run from the rendition of the decree against the principal; and when the decree is revived, no execution having issued on it before revivor, the statute is available to the sureties as a defense against a summary execution on the revived decree, issued more than six years after the rendition of the original decree. *Ib.* 24.
3. *Limitation of action for conversion, or suit in chancery on same demand.*—The statutory limitation of an action for the conversion of crops, brought by the personal representative of the deceased tenant against the surviving tenant in common, is six years (Code, § 3226); and a bill in equity by the distributees of the decedent's estate, filed nineteen years after the alleged conversion, can not be maintained, unless it avers facts which negative the bar of the statute at law. *Sullivan v. Lawler*, 24.
4. *Limitation of action; date and form of summons, and amendment thereof.*—The limitation of an action against a railroad company, to recover damages for personal injuries, is one year (Code, § 3231); and in determining when the action was commenced, the date or form of the summons is not conclusive, it being amendable in these particulars on proper evidence. *Ala. Gr. So. Railway Co. v. Hawk*, 112.
5. *Plea of statute of limitations of three years.*—A plea of the statute of limitations of three years must aver that the demand sued on is an open account, and the omission of this averment makes the plea demurrable; but this rule of pleading is not applicable to a proceeding in the Probate Court, where an administrator files a petition asking an order to sell lands for the payment of debts, and the defense is set up that the debts asserted against the estate are barred by the statute of limitations. *Gayle's Adm'r v. Johnston*, 254.
6. *Limitation of suit for abatement of nuisance.*—By analogy to the statute of limitations at law barring an action for the recovery of lands (Code, § 2900), ten years is a bar in equity to a suit which

LIMITATIONS, STATUTE OF—*Continued.*

- seeks to enjoin and abate an embankment on land as a private nuisance to the owner of the adjacent upper lands. *Nininger v. Norwood*, 277.
7. *Statute of limitations, and lapse of time, as bar to relief against mistake.*—The statute of limitations, or lapse of time, will bar equitable relief against mistake, as well as against fraud; the period of the bar being computed from the discovery of the mistake, or the time at which, by the exercise of reasonable diligence, it might have been discovered. *Harold Brothers & Scott v. Weaver*, 373.
 8. *Same.*—In this case, the complainant having been in the peaceable possession of the land intended to be conveyed, from the execution of the conveyance to him, in which the lands were incorrectly described, to the filing of his bill for the correction of the mistake, a period of more than twenty years, and having only recently learned the mistake, from the assertion of a hostile title and claim by a sub-purchaser from the personal representative of his deceased vendor,—the lapse of time was held no bar to the reformation of the deed. *Ib.* 373.
 9. *Limitation of action for money paid, as between tenants in common.* The complainant being one of the "Swamp Lands" commissioners, and claiming contribution out of the common fund for moneys advanced by him in aid of the common enterprise, which were "to be refunded to him out of the compensation to be received from the State;" such claim did not accrue until the money was received, and the statute of limitations did not begin to run against him, in favor of the other commissioners, until that time; and the bill showing that it was filed within one year after the receipt of the money, the claim is not barred by the statute of limitations, nor by the staleness of the demand. *Powell v. Jones*, 392.
 10. *Pleading statute, as between mortgagor and mortgagee, in action for money had and received.*—In an action by mortgagor against mortgagee, to recover the surplus proceeds of sale after satisfaction of the mortgage debt, a material issue being as to the correct balance due on the mortgage debt, and the amount of credits to which the mortgagor is entitled; proof of items for goods or chattels delivered as partial payments can not be rejected, because an action to recover their value would be barred by the statute of limitations, when the statute is not pleaded. *Hayes v. Woods*, 92.

LIS PENDENS.

1. *Purchase pendente lite.*—A purchaser of land from a party to a pending suit, in which the title or an interest therein is involved, is concluded by the decree afterwards rendered, to the same extent that his vendor is concluded. *Moon's Adm'r v. Crowder*, 79.

MANDAMUS.

1. *When writ lies.*—According to the settled practice of this court, an appeal lies from an order refusing to grant a statutory rehearing after final judgment at law (Code, §§ 3160-68), because such refusal is a final judgment; but, if a rehearing is improperly granted, the remedy for the correct of the error, before final judgment in the case, is by *mandamus*. *O'Neal v. Kelly*, 559.

MARSHALLING ASSETS. See CHANCERY, 29, 30.

MORTGAGE.

1. *When absolute deed will be declared mortgage.*—In a court of equity, a conveyance of lands, absolute and unconditional on its face, will

MORTGAGE—*Continued.*

- be declared and established as a mortgage, on clear and certain proof that the parties intended it should stand simply as a security for a debt; and this fact may be proved by parol evidence, or may be shown by a separate writing. *Turner v. Wilkinson*, 361.
2. *Whether transaction is mortgage, or conditional sale.*—When the conveyance is absolute on its face, and the controversy is whether it was intended as a mortgage or an unconditional sale, the party asserting that it was intended as a mortgage must show, by clear and convincing evidence, that it was so understood and intended by the parties at the time of the original transaction; but, when it is admitted that the transaction is not, as the conveyance on its face imports, an absolute and unconditional sale, and it is doubtful whether it was intended as a mortgage or as a conditional sale, the court is inclined to consider and treat it as a mortgage. *Id.* 361.
 3. *Same.*—The court states the tests of controlling importance in such cases, as laid down in former decisions, and declares the transaction in this case, when subjected to these tests, to have been intended as a mortgage, and not as a conditional sale. *Id.* 361.
 4. *Equitable mortgage created by recital in note.*—A declaration and recital in a promissory note, executed by a mortgagor to the mortgagee, that it "shall be covered by the mortgage," or "shall be subject to the mortgage," shows an intention to make the mortgage a valid security for the debt, and creates an equitable lien or mortgage on the premises for its payment; but, if the note is signed by the husband only, the equitable lien of the note does not attach to the homestead included in the lands conveyed. *Butts v. Broughton*, 294.
 5. *Equitable estoppel against mortgagee.*—Where a mortgagee of lands indorses on the mortgage a receipt for the secured debt before its maturity, and intrusts it to the possession of the mortgagor, pursuant to an agreement between them; and the mortgagor, being in possession of the lands, sells and conveys them to a third person, to whom he also shows the mortgage and indorsement thereon; the mortgage can not be established and enforced against such purchaser, after he has paid the purchase-money without notice of the agreement; and this on the principle, that when one of two innocent persons must suffer from the tortious act of a third, he must suffer the consequences who gave the aggressor the means of doing the wrongful act. *Turner v. Flinn*, 532.
 6. *Mortgage of unplanted crops.*—At common law, unplanted crops, or other things not having an existence, actual or potential, were not the subject of sale, assignment, or mortgage; but, in a court of equity, such sale, assignment or mortgage creates an equitable interest, which attaches to the property when it comes into existence, or is acquired, and which the court will enforce and protect against all other persons than *bona fide* purchasers without notice; and for the conversion or illegal disposition of the property, with notice of the lien, an action on the case may be maintained. *Hurst & McWhorter v. Bell & Co.*, 336.
 7. *Sale of mortgaged lands under execution.*—When mortgaged lands are sold under execution against the mortgagor (Code, § 3209), the purchaser acquires the entire interest of the mortgagor, except his statutory right of redemption; and if this right is not exercised within the two years allowed by law, and the mortgagee then obtains a conveyance from the purchaser, the entire title, legal and equitable, is united and vested in him. *Jenkins v. Lovelace*, 303.
 8. *Agreement by mortgagee to redeem from purchaser, for mortgagor.*—An agreement or promise by the mortgagee to redeem the lands from a purchaser at execution sale, for the benefit of the mortgagor, and to allow him to redeem on repayment of the amount

MORTGAGE—*Continued.*

- advanced, with interest, and the balance due on the mortgage debt, is within the statute of frauds (Code, § 2121), and can not be enforced unless a compliance with the requisitions of the statute is shown; and the re-payment of the money does not take the case out of the statute, unless possession was also taken and held under the contract. *Ib.* 303.
9. *When mortgagee may maintain ejectment; demand, or notice to quit.* After the law-day of a mortgage, default having been made in the payment of the secured debt, the mortgagee may maintain ejectment for the property, without a previous demand, or notice to quit first given to the mortgagor. *Strang v. Moog*, 460.
 10. *Remedies of mortgagee, legal and equitable.*—A mortgagee may file a bill in equity to foreclose the mortgage, although he may also have an adequate remedy at law for the recovery of his debt. *Whitehead v. Lane & Bodley Co.*, 39.
 11. *Foreclosure; parties to bill.*—The personal representative of the deceased mortgagor is a necessary and indispensable party to a bill which seeks to foreclose a mortgage on lands, unless it is shown that the assets in his hands are discharged from all liability for the debt. *Boyle v. Williams*, 351.
 12. *Same.*—When a junior mortgagee files a bill, asking a foreclosure of his mortgage, an account of both of the mortgage debts, and a sale of the property free from the incumbrance of both mortgages, the senior mortgagee is a necessary and indispensable party; and the bill may be filed in the district in which he resides. *Harwell v. Lehman, Durr & Co.*, 344.
 13. *Same; where mortgage has been assigned.*—If the senior mortgage has been assigned, absolutely and unconditionally, leaving in the mortgagee no interest in it or the debt secured by it, the assignee would be a necessary party to a bill for foreclosure filed by a junior mortgagee, and the senior mortgagee would be only a proper party; but, if the assignment was conditional, and the condition had not been performed when the bill was filed, the assignor would be a necessary party, and the bill might be filed in the district of his residence; and being so filed, the subsequent performance of the condition, whereby the assignment became absolute, would not divest the jurisdiction of the court, nor be good ground for dismissing the bill. *Ib.* 244.
 14. *Title of purchaser at sale under decree of foreclosure.*—The title of the mortgagor or his heirs is not divested by a sale and conveyance by the register, purporting to have been made under a decree in a foreclosure suit, unless he or they were made defendants to the bill, and a decree of sale was rendered while they were before the court; and the purchaser at the register's sale, to make out his title as against the mortgagor or his heirs, must show these facts. *Jenkins v. Lovelace*, 303.
 15. *Reference to register before decree of sale.*—When the defendants to a bill for foreclosure are all adults, and do not suggest or claim, in the court below, that the mortgaged premises are susceptible of division, and that a sale of a part only will be sufficient to satisfy the mortgage debt, the court may decree a sale without a reference as to these matters; but, if some of the defendants are infants, or not *sui juris*, it is irregular and erroneous to render a decree of sale, without a prior reference to the register to ascertain and report whether the premises are susceptible of division, whether a sale of part only would not be sufficient, whether the interest of the infants requires a sale in parcels, and what parcel should be first sold. *Boyle v. Williams*, 351.
 16. *Sale under power in mortgage; effect as foreclosure, and ratification of irregular.*—A sale under a power contained in a mortgage, when

MORTGAGE—*Continued.*

valid and regular, is the equivalent of a decree of foreclosure in equity; and the same effect must be attributed to an irregular sale, when ratified by the parties in adverse interest. But a decree of foreclosure only binds the parties to the suit, and does not affect the rights of other persons; and the ratification of an irregular or unauthorized sale, by some of the parties in adverse interest, can not be allowed to prejudice the rights of the others. *Sloan v. Frothingham*, 589.

17. *Sale under power, by foreign administrator.*—A foreign administrator, who has not given bond and had his letters recorded here as required by statute (Code, §§ 2637–40), has no authority to execute a power of sale contained in a mortgage given to his intestate, as a domestic administrator may (*Ib.* § 2198); and a sale by him, under the power, neither cuts off the right of redemption, nor affects the right of a junior mortgagee to be let in to redeem. *Ib.* 589.
18. *Same; ratification by heirs and domestic administrator.*—Though such sale is unauthorized and irregular; yet, if it is ratified by the heirs, next of kin and domestic administrator, and the proceeds of sale are properly applied by the foreign administrator in the due course of administration, the purchaser will be regarded as an equitable assignee of the mortgage and secured debt, and will be subrogated to the rights of the heirs and the domestic administrator. *Ib.* 589.
19. *Mortgagee's liability for rents and profits.*—A mortgagee, entering into possession before a foreclosure, under a sale which is either void or voidable, is accountable for the rents and profits actually received, and such as he might have received by the exercise of reasonable diligence. *Ib.* 589.
20. *Same.*—A mortgagee in possession, and in the perception of rents and profits, is held accountable for them as a trustee; and this principle is here applied against the grantee in an absolute conveyance, which is declared and established as a mortgage only, after he had sold and conveyed to a *bona fide* purchaser for valuable consideration without notice. *Turner v. Wilkinson*, 361.
21. *Same.*—When the mortgagee takes possession of the premises after the law-day of the mortgage, he is liable as a trustee for the rents and profits, including not only the rents which he collects, but also such as he has failed to collect through gross negligence, willful default, or fraud. *Butts v. Broughton*, 294.
22. *Same.*—Under this principle, as applied in this case, the mortgagee having taken possession, and then rented the premises to the widow and adult heirs of the deceased mortgagor; on the statement of the account against him, under a bill to redeem filed by the widow and all the heirs, he was held liable for the rents as if he had collected them. *Ib.* 294.
23. *Usury in mortgage debt; who may plead.*—It may be seriously questioned, under the decisions of this court, whether a mortgage can be impeached on the ground of usury in the secured debt, by any other person than the mortgagor himself, or his personal representative; though the current of modern authority supports the contrary view. *Ib.* 294.
24. *Bill to redeem; who may file.*—A bill to redeem under a mortgage may be filed by any one who owns the mortgagor's equity of redemption, or any subsisting interest therein, by privity of title with him, whether by purchase, inheritance, or otherwise; and under this principle, the widow of the mortgagor, who joined with her husband in the execution of the mortgage, and who claims a homestead in the premises, may be joined with the heirs in a bill to redeem. *Ib.* 294.

MORTGAGE—*Continued.*

25. *Action for money had and received, by mortgagor against mortgagee; lies when.*—When mortgaged property has been sold under a power in the mortgage, and the proceeds of sale have been paid to the mortgagee, an action of assumpsit lies against him, in favor of the mortgagor, to recover the surplus remaining in his hands after paying the mortgage debt and reasonable costs. *Hayes v. Woods, 92.*
26. *Same; partial payments to mortgagee after assignment.*—Partial payments made to the mortgagee, after an assignment of the mortgage, are nevertheless valid credits, if he was in fact authorized to receive them as agent of the assignee. *Ib. 92.*
27. *Same; purchase by mortgagor at sale under power; voluntary payment.* If the mortgagor himself, acting through a third person, become the purchaser at the sale under the mortgage, the payment of the price bid can not be considered a payment voluntarily made, since the title to the land would not be divested by full payment of the debt before the sale, and the sale could only be avoided in equity; but, where the mortgage is of personal property, a different rule might prevail. *Ib. 92.*
28. *Same; whether action lies against mortgagee or assignee.*—The action lies against the mortgagee, although he has paid the money over to the assignee, when it appears that he joined with the assignee in making the sale, collected the money as agent for him, the assignee being a non-resident, and knew that the mortgagor claimed that the debt was paid. *Ib. 92.*

NEGLIGENCE.

1. *Contributory negligence; standing on platform of car while in motion.* A regulation forbidding passengers to stand on the platform of a car while the train is in motion being reasonable and proper, a passenger who is injured while standing on the platform, in violation of such regulation, is guilty of contributory negligence, and can not maintain an action to recover damages for such injuries. *Ala. Gr. So. Railroad Co. v. Hawk, 112.*
2. *Same; in action against municipal corporation.*—When the evidence shows that the route selected by plaintiff, at the time he was injured by a fall caused by a "wash-out" in the side-walk, was the route ordinarily travelled with safety by all persons on foot going in that direction, that the side-walk at that point was wide enough for safe passage on the inside of the "wash-out," and that there was no side-walk on the other side of the street; contributory negligence can not be imputed to him, because he had knowledge of the defect in the side-walk, and did not select a different route. *City Council of Montgomery v. Wright, 411.*
3. *When negligence is question of fact, or of law.*—When the facts are disputed, or when different conclusions may be drawn from the undisputed facts, negligence *vel non* is a question of fact for the determination of the jury; but, when the facts are undisputed, and the inference to be drawn from them is clear and certain, it is a question of law. *Ib. 411.*

NEW TRIAL.

1. *Refusal not revisable.*—By the uniform decisions of this court since its first organization, the granting or refusal of a new trial rests in the sound discretion of the primary court, and is not revisable on error or appeal. *Butler v. The State, 179.*
2. *Separation of jurors, or other misconduct.*—In appellate courts which revise judgments or orders refusing a new trial, the safer and

NEW TRIAL—*Continued.*

sounder rule seems to be, that a new trial is not granted as a matter of course, merely because the jurors were not kept under the eye of an officer from the beginning to the end of the trial, but that such irregularity makes out a *prima facie* case for a new trial, and casts on the prosecution the *onus* of showing affirmatively that the jurors were not tampered with; and that being affirmatively shown, a new trial should not be granted. *Ib.* 179.

3. *Statutory rehearing at law; want of diligence in defending suit.* When an action at law is founded on a bond, or promissory note under seal, given for the purchase-money of land, the plaintiff suing as assignee; and the cause is continued, by consent, to await the termination of a suit in chancery, instituted for the purpose of setting aside the sale and conveyance; so soon as the defendant is informed of the decision of the chancery cause, setting aside the sale and conveyance, and thereby establishing the want or failure of consideration of the notes, it is his duty to prepare to defend the suit at law; and failing to show due diligence, he can not obtain a statutory rehearing after judgment by *nil dicit* (Code, § 3161), on the ground of surprise, accident, or mistake. *Ex parte Kelly*, 560.
4. *Same; how revised.*—According to the settled practice of this court, an appeal lies from an order refusing to grant a statutory rehearing after final judgment at law (Code, §§ 3160-68), because such refusal is a final judgment; but, if a rehearing is improperly granted, the remedy for the correction of the error, before final judgment in the case, is by *mandamus*, and an appeal does not lie. *O'Neal v. Kelly*, 559.

NON-CLAIM. See ESTATES OF DECEDENTS, 2.

NONSUIT. See ERROR AND APPEAL, 2.

NOTARY PUBLIC.

1. *Power to issue attachment.*—A notary public, who is also *ex officio* a justice of the peace, has no power or authority to issue an attachment returnable to the Circuit Court. *Nordlinger v. Gordon*, 339.

NUISANCE.

1. *Private nuisance; jurisdiction of equity to abate; verdict and judgment at law.*—The jurisdiction of a court of equity to enjoin a private nuisance, at the suit of a person thereby aggrieved, compelling its abatement, is well established; and when the legal title of the party complaining is clear and undoubted, it is not necessary that his right should be first established by a verdict and judgment at law. *Nininger v. Norwood*, 277.
2. *Same; adequacy of legal remedies.*—When the injury complained of is permanent, continuous, or constantly recurring, though there may be a remedy at law, it is obviously inadequate; and the interference of a court of equity is necessary, to prevent irreparable injury and a multiplicity of suits. *Ib.* 277.
3. *Same; limitation of action or suit.*—By analogy to the statute of limitations at law barring an action for the recovery of lands (Code, § 2900), ten years is a bar in equity to a suit which seeks to enjoin and abate an embankment on land as a private nuisance to the owner of the adjacent upper lands. *Ib.* 277.
4. *Obstructing flow of waters from upper lands upon lower.*—When two adjacent tracts of land belong to different persons, the upper or dominant tract has a natural easement or servitude in the lower, for the discharge of all waters falling or accumulating from natural

NUISANCE.—*Continued.*

causes on the surface; and any interference with this right, or obstruction of it, by the owner of the lower tract, by the erection of an embankment on his own land, whereby the waters are thrown back upon the upper tract, or their natural flow obstructed, is a private nuisance which a court of equity will enjoin and abate. *Id.* 277.

5. *Obstruction of navigable river.*—The obstruction of the navigation of a public, navigable river, is a public nuisance, which a court of equity will enjoin and restrain at the instance of a citizen who is suffering, or will suffer irreparable injury. *Walker v. Allen*, 450.

OVERRULED CASES.

1. *Crawford v. Kirksey*, 50 Ala. 590, declared overruled in *Moog v. Talcott*, 210.
2. *Maynard v. The State*, 46 Ala. 85, overruled by *White v. The State*, 195.
3. *Stimpson v. Malone & Foote*, 60 Ala. 338, overruled by *Ward v. Corbett*, 438.

PARTITION.

1. *In equity.*—To sustain a bill in equity for the partition of lands, the complainant must allege, and prove if denied, an undivided interest in the lands, jointly or in common with the defendant; and it is not sufficient to show title in severalty to a distinct portion. *Russell v. Beasley*, 190.
2. *By Probate Court.*—Under its statutory power to make partition of lands among joint owners or tenants in common (Code, §§ 3497-3507), the Probate Court has no jurisdiction to decree partition where the lands are not susceptible of division into equal parts, or parts of equal value; and this can not be done, where the parties own unequal interests—as, where one of four joint owners, or tenants in common, has conveyed a part of his undivided interest to another. (Overruling *Stimpson v. Malone & Foote*, 60 Ala. 338.) *Ward v. Corbett*, 438.

PARTNERSHIP.

1. *Real property belonging to partnership.*—Real estate, purchased with partnership funds, or on partnership credit, and for partnership purposes, is, in a court of equity, regarded as partnership property, and subject primarily to the payment of partnership debts, whether the legal title is, in the name of the partnership, in the name of one partner only, or in the names of the several partners as tenants in common; but, to have this effect, the property must be purchased with partnership funds, or on partnership credit, and for partnership uses: and where these two facts do not concur, the title and ownership are unchanged. *Hatchett v. Blanton*, 423.
2. *Change in partnership.*—The introduction of a new member into an existing partnership works its dissolution, and the creation of a new partnership; and the new partner, in the absence of an express agreement, is neither liable for the debts of the old partnership, nor does he acquire any interest in its property. *Id.* 423.

PAYMENT.

1. *When note or bill operates as payment.*—The giving by a debtor of his own bill or note, though negotiable, does not operate to discharge the debt, unless it is accepted as an absolute payment; but, while it is regarded, *prima facie*, as only collateral or additional security,

PAYMENT—*Continued.*

- all the authorities concur that, by express agreement, it may be regarded as a satisfaction and a bar. *Keel v. Larkin*, 493.
2. *Same.*—The English cases require an express agreement, unless the bills received have been negotiated, and are outstanding against the defendant; but the modern American authorities, viewing it as a question of intention, hold that an implied agreement, to be determined by the jury from a consideration of all the facts, may have the same effect; and this is adopted by this court as the correct rule. *Ib.* 493.
 3. *Partial payments to mortgagee after assignment.*—Partial payments made to the mortgagee, after an assignment of the mortgage, are nevertheless valid credits, if he was in fact authorized to receive them as agent of the assignee. *Hays v. Woods*, 92.
 4. *When payment is voluntary or not.*—If the mortgagor himself, acting through a third person, become the purchaser at the sale under the mortgage, the payment of the price bid can not be considered a payment voluntarily made, since the title to the land would not be divested by full payment of the debt before the sale, and the sale could only be avoided in equity; but, where the mortgage is of personal property, a different rule might prevail. *Ib.* 92.

PLEADING AND PRACTICE.

1. *Who is proper party plaintiff.*—When a quantity of corn is delivered to a railroad company for transportation, the consignee having bought it and paid the freight on it, he is the proper party to sue for its non-delivery, and not the consignor from whom he bought it; but the evidence as to these facts being conflicting, the question is properly submitted to the decision of the jury. *S. & N. Ala. Railroad Co. v. Wood*, 451.
2. *Same; amendment of complaint.*—A statutory action in the nature of ejectment must be brought in the name of the person holding the legal title; and if he is described in the summons and complaint as suing for the use of another, these words may struck out, by amendment, as surplusage. *Dane v. Glennon*, 160.
3. *Action by two or more jointly.*—In detinue, or the corresponding statutory action for the recovery of personal property in specie, brought by two plaintiffs suing jointly, both must recover, or neither can. *St. Clair v. Caldwell & Riddle*, 527.
4. *Averment of corporate character and name.*—In an action against a municipal corporation, described by its corporate name, it is not necessary to aver in the complaint that the defendant is a body corporate, since the court will take judicial notice of that fact, and of the identity of the defendant as such corporation. *City Council of Montgomery v. Wright*, 411.
5. *Averment of corporate duty to keep streets and side-walks in repair.* When the duty of keeping "the streets and highways in repair" is imposed on a corporation by its charter, it is only necessary to aver the existence of this duty by way of inducement, when declaring against the corporation for damages resulting from its breach; and this is done with sufficient certainty by the general allegation, "which the defendant is bound to keep in repair." *Ib.* 411.
6. *Plea of statute of limitations of three years.*—A plea of the statute of limitations of three years must aver that the demand sued on is an open account, and the omission of this averment makes the plea demurrable; but this rule of pleading is not applicable to a proceeding in the Probate Court, where an administrator files a petition asking an order to sell lands for the payment of debts, and the defense is set up that the debts asserted against the estate are

PLEADING AND PRACTICE—Continued.

- barred by the statute of limitations. *Gayle's Adm'r v. Johnston*, 254.
7. *Former recovery*.—The rule of *res adjudicata*, or former recovery, is confined to those cases in which the parties are the same, the subject-matter the same, the identical point directly in issue in each, and the judgment in the first suit rendered on that point; and it is essential, also, that the former judgment was rendered on the merits of the case. *McCall v. Jones*, 368.
 8. *Same; what is decision on merits; misjoinder and nonjoinder*.—It is not always easy to determine what issues may be considered as involving the merits of the case; but it seems to be generally conceded, that when the suit is defeated on the single ground of a misjoinder of parties plaintiff, the judgment is not a decision on the merits, and is not a bar to another suit. *Ib.* 368.
 9. *Same*.—An action by husband and wife as joint plaintiffs, to recover damages for the conversion of property belonging to the wife's equitable estate, which had been reduced to possession, having been defeated on the ground that there was a misjoinder of parties plaintiff, the judgment is not a bar to a subsequent action by the husband alone, suing as trustee; though, it seems, if the first action had proceeded to judgment on the merits, the question of misjoinder not being raised, the judgment would be a bar to the second action. *Ib.* 368.
 10. *Former acquittal, or conviction*.—A former acquittal or conviction, pleadable in bar of another prosecution, pre-supposes a trial before a court having jurisdiction to render a judgment on the merits; and this effect can not be attributed to a decision rendered by a court whose authority is limited to the inquiry, whether there is sufficient cause shown for sending the accused to a court having jurisdiction to try and determine the charge. *Nicholson v. The State*, 176.
 11. *Practice as to filing plea in abatement; what is revisable*.—Whether the defendant shall be permitted to withdraw the plea of not guilty, and interpose a plea in abatement on account of a misnomer, is matter of discretion with the court below, and is not revisable by this court. *Hubbard v. The State*, 164.
 12. *Misnomer and variance*.—The mere mis-spelling of a name, whether of the defendant or a third person, does not vitiate an indictment, and is not a fatal variance, unless the difference causes a material change in the pronunciation of the name. *Underwood v. The State*, 220.
 13. *Same; whether question for court or jury*.—Whether one name is *idem sonans* with another, notwithstanding a difference in the spelling of the two, is a question of fact for the determination of the jury, when it arises on the evidence under the plea of the general issue, and not a question of law for the decision of the court. *Ib.* 220.
 14. *Right to open and conclude argument*.—In statutory proceedings for condemnation of the right of way, the railroad corporation is the actor, and on appeal, when an assessment of damages by a jury is demanded, is entitled to open and conclude the investigation and the argument. *Mont. So. Railroad Co. v. Sayre*, 443.

POWERS.

1. *Execution of power*.—In the execution of a power by a donee or trustee, a direct reference to the power is not necessary, though it must not be left uncertain whether the act was done in execution of the power; it must be apparent that the transaction is not fairly or reasonably susceptible of any other interpretation, than as

POWERS—Continued.

indicating an intention to execute the power; and this intention must be collected from all the circumstances. *Matthews v. McDade*, 378.

2. *Same; sale and conveyance by executor and trustee; whether referred to power in will, or to void probate decree.*—Where a deed of trust, conferring on the trustee a power of sale, was admitted to probate as a part of the grantor's will, executed on the same day, and referring to the deed; and the trustee, who was also the sole acting executor, procured from the Probate Court an order of sale which was invalid and inoperative, sold the land five years afterwards, and, as executor, executed to the purchaser a deed with covenants of warranty, but did not report the sale to the Probate Court; *held*, that the sale would, *ut res magis valeat quam pereat*, be referred to the power conferred by the deed as a part of the will, and not to the order of the court. *Ib.* 378.
3. *Presumption from lapse of time.*—After the lapse of twenty years from a sale by an executor and trustee, during which period the purchaser held open, notorious, and uninterrupted adverse possession of the land, although the title of the remainder-men might not be barred, if the power was not legally executed; yet a presumption would arise in favor of the regularity of the sale, and the court would incline to draw inferences favorable to its validity. *Ib.* 378.

PRESUMPTIONS. See ERROR AND APPEAL, 22, 23; EVIDENCE, 60-67.

RAILROADS.

1. *Limitation of action against.*—The limitation of an action against a railroad company, to recover damages for personal injuries, is one year (Code, § 3231); and in determining when the action was commenced, the date or form of the summons is not conclusive, it being amendable in these particulars on proper evidence. *Ala. Gr. So. Railway Co. v. Hawk*, 112.
2. *Failure to blow whistle, or ring bell, on approaching depot or station.* The statutory provisions requiring the engineer, or other person in charge of a moving train of cars, to blow the whistle, or ring the bell, on approaching a depot or stopping-place (Code, §§ 1699, 1700), are intended for the protection of the travelling public, or persons not on the train; and passengers on the train are not, ordinarily, included in the letter or spirit of the statute, and can not complain of its violation, when suing for damages on account of personal injuries, to which the failure to ring the bell could have had no tendency to contribute; though cases may occur, possibly, in which passengers, or other persons permissively on the train, are entitled to have such signals given, as a warning to hasten their departure. *Ib.* 112.
3. *Contributory negligence; standing on platform of car while in motion.* A regulation forbidding passengers to stand on the platform of a car while the train is in motion being reasonable and proper, a passenger who is injured while standing on the platform, in violation of such regulation, is guilty of contributory negligence, and can not maintain an action to recover damages for such injuries. *Ib.* 112.
4. *Declarations of conductor and engineer; when admissible against railroad company.*—In an action against a railroad company, to recover damages for personal injuries sustained by a passenger, a witness for the plaintiff can not be allowed to testify, that the conductor, "a few minutes after the plaintiff had been hurt, asked the engineer why he did not respond to the bell-call; and that the

RAILROADS—*Continued.*

engineer answered, he did respond to all the bell-call he heard." *Id.* 112.

5. *Action for non-delivery of freight; who is proper party plaintiff.*—When a quantity of corn is delivered to a railroad company for transportation, the consignee having bought it and paid the freight on it, he is the proper party to sue for its non-delivery, and not the consignor from whom he bought it; but the evidence as to these facts being conflicting, the question is properly submitted to the decision of the jury. *S. & N. Ala. Railroad Co. v. Wood*, 45L.
6. *Measure of damages for failure to deliver freight.*—In an action against a railroad company as a common carrier, for a failure to deliver goods received for transportation, the measure of damages is the value of the goods at the place of destination; and evidence of their value at the place of delivery, eighty miles distant from the place of destination, is relevant and admissible. *Id.* 45L.
7. *Statutory proceedings for condemnation of right of way; appeal, and trial by jury.*—The statute regulating proceedings for the assessment of damages, when lands are taken by a railroad corporation for the right of way (Code, §§ 1833-40), was intended to carry into effect the constitutional provisions, and must be so construed, if possible, as to effectuate that intention, and to harmonize the statute with the constitution; and thus construing the section which gives an appeal to either party, and declares that "the same proceedings shall be had as in ordinary cases of appeal from the Probate [Court] to the higher courts of the State" (§ 1838), it must be held to give an appeal to the Circuit Court, of which a jury is a constituent, thereby securing the right to a trial by jury, if demanded. *Mont. So. Railroad Co. v. Sayre*, 443.
8. *Same; right to open and conclude argument.*—In these proceedings, the railroad corporation is the actor, and on appeal, when an assessment of damages by a jury is demanded, is entitled to open and conclude the investigation and the argument. *Id.* 443.
9. *State indorsement of railroad bonds; bonds for first twenty miles of road.*—Under the statute approved February 21st, 1870, entitled "An act to furnish the aid and credit of the State of Alabama for the purpose of expediting the construction of railroads" (Session Acts 1869-70, pp. 149-57), it was contemplated that the first twenty miles of the railroad should be completed and equipped from the resources of the corporation, before any of its bonds should be indorsed by the State, and that the indorsed bonds should be used and applied in the further construction of the road; and the bonds referring on their face to the statute under which they were indorsed, every person taking them from the railroad company was put on inquiry, and was chargeable with notice of the requirements of the statute, of the relation of the State as indorser, and of the uses and purposes for which the company could legally transfer them. *Gilman, Sons & Co. v. N. O. & S. Railroad Co.*, 566.
10. *Same; misapplication of said bonds.*—The company having transferred its bonds to the contractor engaged in the construction of the first twenty miles of its road, and, after procuring the State's indorsement on the completion of said twenty miles, again delivered them to him in payment of the company's debt to him; such use of them being unauthorized, and fraudulent as against the State, no liability rested on it by virtue of its indorsement, while the bonds remained in the hands of said contractor, or were in the hands of any other person chargeable with knowledge of the misapplication. *Id.* 566.
11. *Same; rights of bona fide holder.*—But, such indorsed bonds being negotiable instruments, and governed by the same rules as all other commercial paper, the State would become liable, as an ac-

RAILROADS—*Continued.*

- commodation indorser, to any *bona fide* holder who acquired them for value, in the usual course of business, without knowledge or notice, actual or constructive, of the misapplication by the company or its immediate transferee. *Ib.* 566.
12. *Same; burden of proof as to character of transfer.*—When a subsequent holder of such bonds seeks to enforce the State's liability as indorser, the original misappropriation of them being shown, the law casts on him the burden of proving that he acquired them in good faith, for value, and in the usual course of business. *Ib.* 566.
 13. *Same; what is purchase for value, and in usual course of business.* The sale or exchange of such indorsed bonds for shares of stock in another railroad corporation, or in a joint-stock company or corporation engaged in the business of constructing railroads by contract, is an ordinary commercial transaction; and in determining whether the purchase is for value, the safer doctrine is, when no question of usury is involved, that the amount of the consideration, value being parted with, is only material as bearing on the question of notice. *Ib.* 566.
 14. *Same; proof of notice, or want of notice.*—In such case, the presumption is of a want of notice, since it is not probable, though possible, that notice of the original fraud or illegality would be communicated to a subsequent holder, thereby defeating the transfer; and the burden of proving notice resting on the party who assails the title of the holder, it is not enough to show only that he acquired the bonds under circumstances which would have excited, in the mind of a prudent man, suspicions as to the title of the party from whom he purchased. *Ib.* 566.
 15. *Subrogation of holders of indorsed bonds, to State's statutory lien and priority.*—The holders of such indorsed bonds who have acquired them in good faith, for valuable consideration, and in the usual course of business, are entitled to be subrogated to the statutory lien and priority of the State, on the railroad company becoming insolvent, and making default in the payment of the bonds according to their terms; and this subrogation may be declared in a suit between the holders of such bonds, some of whom are not entitled to share in the protection given to the others, and although the State is not a party and can not be sued. *Ib.* 566.

RECEIVER. See CHANCERY, 49-54.

SOLICITOR.

1. *Compensation of solicitor of Mobile, under special statute.*—Under the special statute regulating the expenditures of Mobile county, approved February 11th, 1843 (Sess. Acts 1842-3, p. 77); the second section of which provides, "that the moneys arising from fines and forfeitures shall be subject to a charge of five per-cent. on the amount that shall be collected, in favor of the solicitor of the circuit, in consideration of the number of cases in which costs remain uncollected, and in consideration of his services in collecting and paying the same to the county treasurer;" the solicitor can claim compensation, not on the entire amount of fines and forfeitures collected and paid into the treasury, but only on the amount collected and paid in by him. *The State, ex rel. Tompkins v. Stone, 185.*

SPECIFIC PERFORMANCE. See CHANCERY, 58-64.

STATUTES.

1. *Statutes omitted from Code.*—The act approved March 4th, 1876, entitled "An act to allow married women in certain cases to sue in

STATUTES—Continued.

their own names" (Sess. Acts 1875-6, p. 159), having been omitted from the Code of 1876, is not now operative as a statute. *Sawyers v. Baker*, 49.

2. *Amending and repealing statutes.*—A statute may be amended, as well as repealed, by implication; and it is not necessary that the amending statute, in order to be free from constitutional objection, should even refer to the statute which it operates to amend. *Washington v. The State*, 272.
3. *Statutes construed with reference to common law.*—All statutes are to be construed with reference to the principles of the common law; and an intention to abrogate or modify it is not to be presumed, further than is expressed, or absolutely required by the case. *Beale v. Posey*, 323.

SUBROGATION. See CHANCERY, 43, 62, 67, 68.

SUMMARY PROCEEDINGS. See JUDGMENTS AND DECREES, 17.

SUMMONS.

1. *Date and form; amendment.*—In determining when the action was commenced, the date or form of the summons is not conclusive, it being amendable in these particulars on proper evidence. *Ala. G. So. Railroad Co. v. Hawk*, 112.
2. *Construction; charge referring legal question to jury.*—It is the duty of the court to determine whether the summons is an original or an *alias*, and a charge which refers the decision of that question to the jury is erroneous. *Ib.* 112.

SUPERSEDEAS.

1. *Parties to petition; liability of assignee for costs.*—When a petition is filed for the *supersedeas* of an execution, sued out by an assignee in the name of the original plaintiff, the assignee may be made a defendant thereto; and if he comes in voluntarily as a party, and is unsuccessful in resisting the *supersedeas*, costs may be adjudged against him, under the general statute (Code, § 3128), as the unsuccessful party in a civil suit. *Eslava v. Farley*, 214.
2. *Sureties for costs, by party resisting supersedeas of execution.*—There is no statute which requires the assignee of a judgment, when resisting the *supersedeas* of an execution sued out by him in the name of his assignor, to give security for the costs if unsuccessful, or which authorizes a summary judgment against sureties given by him voluntarily; yet he can not assign as error such summary judgment against his sureties, since it is not prejudicial to him. *Ib.* 214.
3. *When appeal bond operates as supersedeas.*—Under the United States statutes regulating writs of error and appeals (Rev. Stat. §§ 1,000 *et seq.*), as judicially construed by the Federal courts, the bond does not operate as a *supersedeas* of the judgment, unless it is approved by a justice or judge of the Circuit Court, and a copy of the writ of error is deposited, for the adverse party, with the clerk of said court. *Crowder v. Morgan*, 535.

SURETIES.

1. *Discharge of sureties by judgment discharging principal.*—Where a tax-collector executed an additional bond, as required on the address of the grand jury (Code, §§ 184-90), on which was one new surety besides the sureties on the first bond; and separate actions were brought on each bond, and the same breaches assigned for a

SURETIES—Continued.

- default covered by each; *held*, that a judgment on verdict in an action on the first bond, in favor of the defendants, operated as a discharge of the principal and sureties on the second bond, and was pleadable in the action on that bond. *The State v. Parker, 181.*
2. *Surety's rights, as against fraudulent and voluntary conveyances.*—A surety is a creditor, within the meaning of the statute of frauds (Code, § 2124), and entitled to protection against fraudulent and voluntary conveyances, from the time when his contingent liability was assumed, although he has no technical right of action until he has paid the debt. *Keel v. Larkin, 493.*
 3. *Discharge of surety by tender, or offer to pay by principal.*—A formal tender to the creditor, by the principal debtor, of the full amount of the debt after maturity, and the refusal of the creditor to accept it, discharges the surety; but a general offer to pay, not having the formalities of a legal tender, and not definitely refused by the creditor, has no legal effect on the liability of the surety, unless it operates to his injury or prejudice. *Life Association v. Neville, 517.*
 4. *Same.*—If the principal debtor was insolvent at the time when such informal offer was made and declined, the creditor's failure to accept it operates to the prejudice and injury of the surety, and therefore discharges him. *Ib. 517.*
 5. *Limitation of 'action' against sureties on administration bond.*—Under the statute which prescribes six years as the limitation of "actions against the sureties of executors, administrators or guardians, for any misfeasance or malfeasance whatever of their principal, the time to be computed from the act done or omitted by their principal which fixes the liability of the surety" (Code, § 3226, subd. 7); the word *actions*, being liberally construed, includes a summary execution against the surety, on the return of 'No property found' on an execution issued on a decree against his principal; the statute begins to run from the rendition of the decree against the principal; and when the decree is revived, no execution having issued on it before revivor, the statute is available to the sureties as a defense against a summary execution on the revived decree, issued more than six years after the rendition of the original decree. *Martin v. Tally, 23.*
 6. *Decree against principal; conclusiveness as against sureties.*—A decree rendered against an administrator, on final settlement of his accounts, is equally conclusive on his sureties, in the absence of fraud or collusion, as to the matters of account, but not as to the *factum* of the bond, or other defenses personal to the sureties; and when such decree is revived against the administrator, the revivor is equally conclusive on his sureties, except as to such personal defenses, although they were not parties to such revivor, and had no right to appear and defend against it. *Ib. 23.*
 7. *Subrogation of sureties on note for purchase-money, to vendor's lien on land, as against sub-purchaser who has made payment.*—If the sureties on a note given for the purchase-money of land, having paid the balance due on the note, can claim to be subrogated to the vendor's equitable lien on the land, they can not assert that right against a sub-purchaser of a portion of the tract, when the purchase-money paid by the latter has been applied in partial payment of the note on which the sureties were bound. *Sawyers v. Baker, 49.*

"SWAMP LAND COMMISSIONERS."

1. *Relation between; not partners, but tenants in common.*—The "Swamp Land Commissioners" appointed by the governor under the provisions of the act approved February 24th, 1860 (Sess. Acts 1859-

"SWAMP LAND COMMISSIONERS"—*Continued.*

- 60, p. 117), whose duties were to locate and procure for the State patents for the swamp and overflowed lands donated by act of Congress approved September 28th, 1850, and who were to receive as compensation for their services twenty per cent. of the amount realized by the State on the subsequent sale of the lands, were not partners *inter se* in the compensation to be earned, but rather sustained to each other the relation of tenants in common. *Powell v. Jones*, 392.
2. *Equitable lien created by agreement.*—An agreement among said commissioners, by which one was to advance moneys deemed necessary in the execution of the common business, to be reimbursed out of the fund provided as compensation when collected, creates a charge or lien on the fund, for the amount so advanced, in the nature of an equitable mortgage; which lien or charge is not capable of enforcement at law, and is peculiarly within the jurisdiction of a court of equity. *Ib.* 392.
 3. *Same; limitation of suit.*—The complainant, one of said commissioners, claiming contribution out of the common fund for moneys advanced by him in aid of the common enterprise, which were "to be refunded to him out of the compensation to be received from the State;" such claim did not accrue until the money was received, and the statute of limitations did not begin to run against him, in favor of the other commissioners, until that time; and the bill showing that it was filed within one year after the receipt of the money, the claim is not barred by the statute of limitations, nor by the staleness of the demand. *Ib.* 392.
 4. *Rights of S. S. Houston's heirs, under special statute authorizing suit.* Under the special statute approved December 17th, 1873, authorizing the three surviving commissioners "and the legal representatives or heirs of S. S. Houston," the deceased commissioner, to prosecute a suit in equity against the State, for the purpose of determining their compensation and adjusting the rival claims of other persons (Sess. Acts 1873, pp. 65-67), the heirs of said Houston only succeeded to his rights, and took his share of the common fund charged with all liens to which it was subject in his hands. *Ib.* 392.

TAXES.

1. *Purchase at tax-sale.*—*Held*, on the authority of *Oliver v. Robinson*, 58 Ala. 46, that "neither the averments nor proofs in this case," as to a purchase of lands at a sale for unpaid taxes assessed against owners unknown, "are sufficient to effect a divestiture of title for non-payment of taxes." *Gilchrist v. Shackelford*, 7.
2. *Sale of lands for unpaid taxes; description of lands in assessment and deed; admissibility of parol evidence to remove ambiguity.*—When lands assessed and sold for unpaid taxes are described in the assessment, and also in the tax-collector's deed, as "two-thirds ($\frac{2}{3}$) of square 39 in Fisher's tract," without any other words of description or identification, the sale is void for uncertainty and indefiniteness; and the ambiguity being patent, it can not be corrected or explained by extrinsic parol evidence. *Bane v. Glennon*, 160.
3. *Tax-sale; deed to purchaser, as color of title.*—When lands are sold for unpaid taxes, the deed to the purchaser, though it may be invalid as a conveyance of the title, is color of title, when possession has been taken and held under it; and is admissible as evidence for the grantee, or one holding under him, to show the extent of the possession according to the boundaries therein described. *Storall v. Fowler*, 77.

TENANTS IN COMMON.

1. *Conversion of crops between tenants in common.*—A tenant in common of crops, selling the entire property in them, is guilty of a conversion, for which the other tenant (or his personal representative, in the event of his death) may maintain an action of trover. *Sullivan v. Lawler*, 74.
2. *Right to compensation for extra services.*—Ordinarily, one tenant in common can not recover of the others compensation for services performed by him in managing or taking care of the property, without a promise, express or implied, to pay for such services; but the rule is otherwise, when he performs extraordinary services for the common benefit—services not within the duties required of him by law, nor within the contemplation of his co-tenants; for all charges and expenditures thus incurred, the right of contribution exists, and may be enforced as an equitable charge on the common fund or property. *Powell v. Jones*, 392.
3. "*Swamp Land Commissioners*" are tenants in common.—The "Swamp Land Commissioners" appointed by the governor under the provisions of the act approved February 24th, 1860 (Sess. Acts 1859-60, p. 117), whose duties were to locate and procure for the State patents for the swamp and overflowed lands donated by act of Congress approved September 28th, 1850, and who were to receive as compensation for their services twenty per cent. of the amount realized by the State on the subsequent sale of the lands, were not partners *inter sese* in the compensation to be earned, but rather sustained to each other the relation of tenants in common. *Ib.* 392.

TRIAL OF RIGHT OF PROPERTY.

1. *What will support claim suit.*—On the trial of a statutory claim suit, the claimant must recover, if at all, on the strength of his own title; and it being shown that, at the time of the levy, the property was in the possession of the defendant in the writ, the claimant can only repel the presumption of ownership, arising from such possession, by showing title in himself, or by connecting himself with the outstanding title of a third person. *Pollak & Co. v. Graves*, 347.
2. *What defects in process are available to claimant.*—On a statutory trial of the right of property, the claimant can not take advantage of any defects or irregularities in the process which render it merely voidable at the instance of the defendant; but, if the process is void on its face, he may defeat the plaintiff's claim by setting up such invalidity. *Nordlinger v. Gordon*, 239.

TROVER.

1. *Conversion of crops between tenants in common.*—A tenant in common of crops, selling the entire property in them, is guilty of a conversion, for which the other tenant (or his personal representative, in the event of his death) may maintain an action of trover. *Sullivan v. Lawler*, 74.
2. *Limitation of action for conversion, or suit in chancery on same demand.*—The statutory limitation of an action for the conversion of crops, brought by the personal representative of the deceased tenant against the surviving tenant in common, is six years (Code, § 3226). *Ib.* 74.
3. *Conversion by bailer, when bailor may sue.*—If the hirer of a mule exchanges the animal for another during the term, without the consent or authority of the owner, this is a conversion, for which the owner may at once terminate the bailment; and he may sue for his mule before the expiration of the term of hiring. *Atkinson v. Jones*, 248.

TRUSTS.

1. *Parol trust; sufficiency of evidence to establish.*—A trust in lands, created verbally, can not be established in equity, unless it is plain and unambiguous in its terms, and proved by clear and convincing evidence; and a trust in personal property, created verbally, and dependent entirely upon oral testimony, can only be established by clear and explicit evidence. *Bailey v. Irwin*, 505.
2. *Parol trust in lands.*—Oral evidence, to overturn a writing in any case, must be clear and convincing; and can not be received (Code, § 2199) to engraft an express trust on a conveyance of lands which is absolute in its terms. *Kelly v. Karsner*, 106.
3. *Trust in fraud of creditors.*—When lands are conveyed by a debtor to his wife or child, with the intent to place the property beyond the reach of his creditors, and to be held in secret trust for his own benefit, neither he nor his heirs can enforce the trust. *Ib.* 106.
4. *Parties to bill to enforce trust.*—When lands are held in trust, express or implied, and the *cestui que trust* dies, the right to enforce the trust descends to all of his heirs equally, and all are necessary parties to a bill filed for that purpose. *Ib.* 106.
5. *Resulting trust, implied from payment of purchase-money.*—A resulting trust in lands, in favor of the person who advances the purchase-money, the title being taken in the name of another, is matter of implication only, and is easily overturned; and when the money is advanced by a husband (or father), and title taken in the name of the wife (or child), the presumption arises that an advancement was intended. *Ib.* 106.
6. *Implied trust; against executor, purchasing at his own sale, or from his vendee.*—A purchase of lands by an executor at his own sale, whether directly in his own name, or indirectly through the agency of a third person, and whether made under an order of court or a power in the will, will be set aside in equity, at the mere election of the parties in interest, if seasonably expressed; but, having made a fair sale to a third person, he may afterwards purchase from his own vendee, and thereby acquire a good title, though the transaction will be jealously scrutinized by a court of equity. *Forworth v. White*, 224.
7. *Same; against attorney, purchasing at sale under execution in favor of client.*—An attorney, having recovered a judgment for his client, and having the control thereof, can not, without the consent of his client, express or implied, become the purchaser of lands at a sale under execution issued thereon; and if he does so purchase, he becomes, like any other agent, a trustee for his client. Such a trust arises by operation of law, and continues until barred by lapse of time, or until terminated by an election to ratify the purchase, thereby giving it validity. *Pearce v. Gamble & Bolling*, 341.
8. *Same; who may enforce such trust.*—A receiver, appointed by the Chancery Court, succeeding to all the rights and remedies of the client, and authorized to sue, may file a bill to enforce this implied trust against the attorney; and the *onus* is on the attorney to show that the right has been lost by *laches*, or that the purchase has been ratified. *Ib.* 341.

USURY.

1. *In mortgage debt; who may plead.*—It may be seriously questioned, under the decisions of this court, whether a mortgage can be impeached on the ground of usury in the secured debt, by any other person than the mortgagor himself, or his personal representative; though the current of modern authority supports the contrary view. *Butts v. Broughton*, 294.

VARIANCE. See EVIDENCE, 72-74.

VENDOR AND PURCHASER.

1. *Warranty on sale of goods.*—In the absence of fraud, the general rule of the common law is, that the buyer of goods takes them at his own risk, in the absence of an express warranty, unless a warranty is implied from the nature and circumstance of the sale. *Gachet v. Warren & Burch*, 288.
2. *Same, on sale of goods by description.*—When goods are sold by description, and the buyer has not an opportunity of inspecting them, it is of the essence of the contract that the goods delivered shall answer to the description; and there is also an implied warranty that the article furnished shall be merchantable. *Ib.* 288.
3. *Same, on sale by manufacturer or dealer.*—When a manufacturer or dealer contracts to supply an article which he makes, or in which he deals, knowing that the purchaser wishes to apply it to a particular purpose, and necessarily trusts to his judgment or skill, there is an implied warranty on his part that the article shall be reasonably fit for the purpose to which it is to be applied; but, if he contracts to sell a known and described article, and delivers that article, though he may know that the purchaser intends it for a specific purpose, there is no implied warranty that it is suitable for that purpose. *Ib.* 288.
4. *Same, on sale by sample.*—On a sale of goods by sample, the seller only warrants that the bulk of the goods delivered shall correspond with the sample. *Ib.* 288.
5. *Sale of machinery; admissibility of parol evidence to affect writing; burden of proof as to fraud or misrepresentation; defenses available to purchaser.*—On a sale of machinery by a manufacturer, the contract being reduced to writing, and the machinery delivered corresponding with the description therein contained, parol evidence is not admissible, in the absence of fraud or misrepresentation, to vary the terms of the writing; the burden of proving fraud or misrepresentation is on the purchaser; and not being established by the evidence, he can not resist the payment of the agreed price, when there is no warranty, because the machinery was found to be unsuitable for the particular purpose for which it was intended. *Whitehead v. Lane & Bodley Company*, 39.
6. *Description of premises in conveyance.*—When a conveyance of lands contains a particular description of the premises conveyed, by which they can be clearly identified, the insertion of other descriptive words, which are inapplicable, or incapable of definite application, will not be allowed to defeat it. *Ib.* 39.
7. *Contract for sale of lands; sufficiency of description.*—A written agreement to sell "forty acres of land," without other descriptive words, is void for uncertainty. *Thompson v. Gordon*, 455.
8. *Parol evidence removing ambiguity, and identifying land sold.*—As to the sufficiency of the parol evidence adduced in this case, showing the particular tract of land of which the purchaser was placed in possession, and thereby removing the uncertainty and ambiguity of description contained in the written contract, the court expresses no opinion, but cites the following cases: *Chambers v. Ringstaff*, 60 Ala. 140; *Ellis v. Burden*, 1 Ala. 458; *Mead v. Parker*, 115 Mass. 413; *Holmes v. Evans*, 48 Miss. 247. *Ib.* 455.
9. *Purchase pendente lite.*—A purchaser of land from a party to a pending suit, in which the title or an interest therein is involved, is concluded by the decree afterwards rendered, to the same extent that his vendor is concluded. *Moon's Adm'r v. Crowder*, 79.
10. *Construction of deed, as to quantity of land conveyed.*—Where the lands conveyed by a deed are described by their subdivisions and numbers in the United States surveys, including fractional parts of several sections, with the words added, "making in all five hundred and twenty-seven acres," followed by a designation of

VENDOR AND PURCHASER—*Continued.*

- the boundary lines on each side, as indicated by the adjacent lands and the river, and the price paid is a gross sum; the words specifying the quantity are mere matter of description, and not a covenant warranting the quantity. *Rogers v. Peebles*, 529.
11. *Effect of adverse possession on conveyance.*—To avoid a conveyance of lands made by one who is out of possession, on the ground of adverse possession in another, it is not necessary that the adverse possessor should have color of title, nor is it sufficient to show only the exercise of acts of ownership by him; to avoid the conveyance, he must be in adverse possession, "exercising acts of ownership, and claiming to be rightfully in possession." *Humes v. Bernstein*, 546.
 12. *Judicial sales; not affected by maintenance, or adverse possession.*—A judicial sale—that is, a sale made by a public officer, under legal process—is not within the doctrine against maintenance, and its validity is not affected by the fact that the land is at the time in the possession of a third person, claiming adversely to the defendant in the process. *Ib.* 546.
 13. *Protection extended to bona fide purchaser without notice.*—A purchaser in good faith, and for valuable consideration, of lands chargeable with an outstanding equity, of which he had no notice until after he had paid the purchase-money, will be protected against it in a court of equity. *Turner v. Wilkinson*, 361.
 14. *Possession as evidence of title; unrecorded deed.*—The open, notorious, and exclusive possession of land by a purchaser, claiming the land as his own, though holding under an unrecorded deed, is constructive notice of his title, whether it be legal or equitable; but, if the purchaser and his vendor are both in possession when the deed is executed, and there is no change in the possession after its execution, a third person would not be charged with constructive notice of the deed, and would be entitled to protection against it. *McCarthy v. Nicrosi*, 332.
 15. *Possession as evidence of title, and protection to possessor against subsequent incumbrance.*—The open, notorious, and exclusive possession of land by a purchaser, claiming it as his own, whether in trust or otherwise, is constructive notice to all the world of his title, whether it be legal or equitable; and he is entitled to protection against a mortgage subsequently executed by his vendor, and against any one claiming under such mortgage. *Sauyers v. Baker*, 49.

VENIRE. See CRIMINAL LAW, 23, 24.

VENUE. See CRIMINAL LAW, 10.

VERDICT.

1. *Amendment of verdict.*—A general verdict is always sufficient, when it responds in substance to every material fact involved in the issue; and the court may put it in proper form, with or without the consent of the jury; but, when the verdict is defective in substance, the court has no power to amend it, but should send the jury back for further deliberation; and if it is received, and the jury discharged, the court has no power to convene the jurors on a subsequent day, and let them perfect it. *St. Clair v. Caldwell & Riddle*, 527.
2. *Same; form and sufficiency.*—In detinue, or the corresponding statutory action for the recovery of personal property in specie, brought by two plaintiffs suing jointly, both must recover, or neither can; and a claim to the property being interposed by a third person, a

VERDICT—*Continued.*

verdict in favor of one of the plaintiffs only is defective in substance, and can not be amended by the court; nor can it be amended by the jury, on a subsequent day, after they have been discharged. *Ib.* 527.

WATER-COURSES.

1. *Navigable river; what constitutes.*—Every stream which, in its natural state, and with its ordinary volume of water, is capable of being used for the purposes of commerce, for the transportation of the products of the fields, forests or mines on its banks, in a marketable condition, is public for the purposes of navigation; and it is not necessary that the ordinary state of the waters should render them navigable continuously at all seasons of the year. *Walker v. Allen*, 456.
2. *What streams are navigable.*—All tidal streams are, *prima facie*, public and navigable; and all streams above tide-water, not treated as navigable in the surveys made under the authority of the United States, are, *prima facie*, private, not navigable, and not subject to a public right of floatage. *Ib.* 456.
3. *Same; question of law and fact.*—Whether a stream is navigable or not, is a mixed question of law and fact; but, when the facts are ascertained, it becomes a question of law. *Ib.* 456.
4. *Same; judicial knowledge.*—The court judicially knows that there are no tidal streams in Jackson county; and Paint-Rock river is, *prima facie*, not a public navigable stream. *Ib.* 456.
5. *Injunction against obstruction of navigable river.*—The obstruction of the navigation of a public, navigable river, is a public nuisance, which a court of equity will enjoin and restrain at the instance of a citizen who is suffering, or will suffer irreparable injury. *Ib.* 456.
6. *Same; burden of proof, and sufficiency of averments.*—When a party claims that a stream above tide-water, which was not treated as navigable by the United States surveyors, is in fact public and navigable, the *onus* of proof rests on him; and he must also state facts from which the court can draw the conclusion that the stream is navigable. An averment in the bill that the stream "is a navigable river," is merely the statement of a legal conclusion; and, coupled with the additional averment that complainant has used it, for the floatage of saw-logs, for a period of eighteen months before the filing of his bill, without more, is not sufficient to show that the stream is navigable. *Ib.* 456.
7. *Easement for flow of waters from upper lands to lower.*—When two adjacent tracts of land belong to different persons, the upper or dominant tract has a natural easement or servitude in the lower, for the discharge of all waters falling or accumulating from natural causes on the surface; and any interference with this right, or obstruction of it, by the owner of the lower tract, by the erection of an embankment on his own land, whereby the waters are thrown back upon the upper tract, or their natural flow obstructed, is a private nuisance which a court of equity will enjoin and abate. *Nininger v. Norwood*, 277.

WILLS.

1. *Reference to another paper, as part thereof.*—A testator may, in his will, so refer to another instrument or writing executed by him, as to make it part of his will, as if incorporated therein; but, to have this effect, the reference must be so clear and distinct as to leave no reasonable ground for mistake as to his intention. *Matthews v. McDade*, 377.

WILLS—Continued.

2. *Conclusiveness of probate, as to testamentary character of paper.*—A deed of trust making a partial disposition of his property, having been executed by the testator on the same day with his will, attested by the same witnesses, and admitted to probate with the will, as a part thereof, one of the executors being also made trustee in the deed; the probate is conclusive as to the testamentary character of the deed, until reversed on appeal, or successfully contested by bill in equity under statutory provisions (Code, § 2336). *Ib.* 377.
3. *Probate of will, and revocation thereof, in Louisiana.*—A proceeding to revoke the probate of a will, like an application for its probate, is a proceeding *in rem*; and notice thereof to non-resident persons who are interested must, of necessity, be constructive, as authorized by law; and under the laws of Louisiana, as proved in this case, this constructive notice is given by the appointment of a curator to represent and protect the interests of such non-residents. *Martin v. King*, 354.
4. *Keeping estate together under will; whether personal trusts or executorial duties are conferred.*—Testamentary provisions authorizing and directing an executor to keep the estate together for the term of ten years, cultivating the lands with the labor of slaves, and, at the expiration of that term, to sell all the property not specifically bequeathed, and divide the proceeds of sale among the several legatees, construed in the light of the statutory provisions which, in 1863-4, authorized the Probate Court to confer similar powers on executors, do not impose personal trusts upon the executor, but duties and powers strictly executorial, which he could not exercise without the grant of letters testamentary, and which might be exercised by an administrator with the will annexed. *Forworth v. White*, 324.

WITNESS.

1. *Competency of child as witness.*—A child, between eleven and twelve years of age, being offered as a witness in this case, and being examined by the court to test her competency, "manifested an entire want of instruction as to the nature and effect of an oath. of all religious training, and utter ignorance of a Supreme Being. the rewarder of truth and the avenger of falsehood;" saying that she had never heard of God, heaven or hell, and did not know that she would be punished, if she swore falsely, otherwise than by being put in jail. *Held*, that the court erred in permitting her to testify as a witness. *Beason v. The State*, 191.
2. *Disqualification of infamous person as witness.*—A conviction of an infamous offense disqualifies a person as a witness, but the mere finding of a true bill against him does not have that effect. *Powell v. The State*, 194.
3. *Same.*—A conviction of the common-law offense of larceny renders a person incompetent as a witness; but a conviction of the statutory offense of embezzlement does not have that effect, unless the particular act would have been larceny at common law. *P. & M. Insurance Co. v. Tunstall*, 142.
4. *Same; presumption in favor of judgment.*—When objection is made to the competency of a witness, on account of a conviction of embezzlement, and the objection is sustained by the court below, this court will indulge the presumption, unless the record repels it, that the act would have been larceny at common law. *Ib.* 142.
5. *Objection to competency of witness; when made, or waived.*—Cross-examining, without objection, a witness whose deposition is taken, is a waiver of objection to his competency; but, when there is no

WITNESS—Continued.

- cross-examination, or filing of cross-interrogatories, the objection may be made at any time before the trial is begun. *Ib.* 142.
6. *Competency of party to testify as to transactions with deceased person.* Under a bill to foreclose a mortgage, the mortgagee can not testify as to any transactions between himself and the deceased mortgagor. *Junkins v. Lovelace*, 303.
 7. *Same.*—Under a bill to enforce an alleged lien on land, filed by the personal representative of the deceased vendor, the defendant is incompetent to testify in his own behalf, as to any transactions between himself and the decedent (Code, § 3058), unless called to testify by the complainant. *Binford's Adm'r v. Dement*, 491.
 8. *Proof of transactions with decedent; who may testify as to.*—When a homestead exemption is claimed by the widow and infant children of the deceased defendant in execution, and their claim is contested by the plaintiff, a surety who is bound for the debt on which the judgment is founded, though not a party to the contest, is incompetent to testify to any transactions between the plaintiff and the deceased defendant (Code, § 3058), since he is beneficially interested in the result. *Keel v. Larkin*, 493.
 9. *Impeaching witness by proof of former testimony.*—The statements contained in a bill of exceptions, reserved on a former trial, are not competent evidence to contradict the testimony of a witness on a subsequent trial. *S. & N. Ala. Railroad Co. v. Wood*, 451.
 10. *Impeaching witness by proof of former statements.*—An affidavit made by a witness in another suit can not be received to impeach his testimony as given orally, unless the two statements are contradictory and irreconcilable as to a material matter. *Callan v. McDaniel*, 96.
 11. *Impeaching and sustaining witness.*—When the testimony of a witness has not been impeached, evidence should not be received to sustain his credibility. *Moon's Adm'r v. Crowder*, 79.
 12. *To what witness may testify.*—A witness may testify, as a fact, that he "knew and recognized the walk" of another person. *Beale v. Posey*, 323.
 13. *Same.*—On a trial under an indictment for infanticide, a witness who examined the dead body of the child may, though not an expert, testify that he "considered it fully developed;" this being a matter of fact open to observation, and the witness being subject to cross-examination as to his use of the words and his knowledge of their meaning. *Hubbard v. The State*, 164.
 14. *Proof of handwriting by comparison.*—When the genuineness of a writing or signature is disputed, extraneous writings, though admitted to be genuine, can not be presented to the court or jury, nor shown to a witness, that he may institute a comparison between them and the disputed one. *Moon's Adm'r v. Crowder*, 79.
 15. *Same.*—A person who has seen another write, or who knows his handwriting, may express his opinion as to the genuineness of a disputed signature, though he be not an expert; and experts may go further—may institute comparisons between the disputed writing and those admitted to be genuine, and give their opinion whether both were written by the same person, or whether a particular writing or signature is genuine or forged. *Ib.* 79.
 16. *Map, or diagram; when admissible as evidence.*—A surveyor, or expert, testifying as to the form, configuration, or dimensions of the land in controversy, may introduce a map or diagram, made by himself, to aid in making his testimony intelligible; and such map or diagram may then be submitted to the jury, to aid them in understanding or remembering his testimony. But such map or diagram is not *prima facie* or presumptively correct, unless prepared by a county surveyor, after notice to the party in adverse interest,

WITNESS—*Continued.*

as provided by the statute (Code, § 868) ; and not having been so prepared, but made by the witness without having the title-papers before him, and admitted by him, on examination of the deeds, to be incorrect, it should not be allowed to go to the jury for any purpose. *Humes v. Bernstein*, 546.

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